87-1532

No. 87-

Supreme Court, U.S.
FILED
MAR 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

BILL ARMONTROUT,
Warden, Missouri State Penitentiary,
Petitioner,

vs.

LEATRICE LITTLE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM L. WEBSTER
Attorney General
JOHN M. MORRIS III
Counsel of Record
Assistant Attorney General
PATRICK L. KING
(*Of Counsel*)
Assistant Attorney General
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-3321
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

I.

Whether the Due Process Clause of the Fourteenth Amendment entitles an indigent defendant to the appointment, at state expense, of nonpsychiatric experts to assist in his defense at trial.

II.

Whether an indigent defendant was entitled under the Due Process Clause of the Fourteenth Amendment to the appointment of an expert at state expense absent a showing prior to trial that the expert assistance was likely to be a significant factor at trial.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, *en banc* (App. A1), is as yet unreported. The Court of Appeals had originally issued an opinion, reported at 819 F.2d 1425. That opinion also appears in the appendix of this petition (App. A12). The order of the United States District Court for the Eastern District of Missouri is unreported and appears in the appendix of this petition (App. A35).

Petitioner originally appealed his conviction to the Missouri Court of Appeals for the Eastern District of

Missouri. That Court's order, which is unreported, is reprinted in the appendix (App. A47). After issuing its opinion reversing petitioner's conviction, the Missouri Court of Appeals transferred petitioner's case to the Missouri Supreme Court. The Missouri Supreme Court affirmed petitioner's conviction. That Court's opinion, which is reported at 674 S.W.2d 541, is reprinted in the appendix (App. A37). This Court denied certiorari at 470 U.S. 1029, 105 S.Ct. 1398, 84 L.Ed.2d 786 (1985).

JURISDICTION

The United States Court of Appeals' opinion was issued on December 23, 1987. Pursuant to 28 U.S.C. §2101 (c) and Supreme Court Rule 20, the present petition for a writ of certiorari was required to be filed within ninety days of the Court of Appeals' opinion. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS CITED

1. Section I of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

After trial before a jury in the Circuit Court of Cape Girardeau County, Missouri, Respondent Leatrice Little was convicted of rape, a violation of §566.030.1, RSMo, and burglary, a violation of §569.160, RSMo. He was sentenced to consecutive terms of twenty years for rape and five years for burglary. Little obtained a writ of habeas corpus under 28 U.S.C. §2254, setting aside those convictions. It is from the grant of Little's petition for a writ of habeas corpus that the Warden asks this Court to grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

In order for the Court to fully appreciate the Warden's argument, he will set forth the facts in this case.

M.B.G. lived in an apartment in Cape Girardeau, Missouri. During the early evening hours of August 13, 1980, M.B.G. was attacked in her apartment by an intruder who had entered the apartment through a living room window. M.B.G. was grabbed around her chest by her assailant, who wore her black and red checked shirt on his body and who had wrapped one of her blouses around his head. She struggled with her attacker. As the two of them struggled, the blouse came away from the man's face, and M.B.G. "got a good hard look at the side of his face"; it was "black, clean-shaven, smooth, cheekbone high, round, his jaw was rounded, his chin, his lips, his nose" (App. A51). M.B.G. observed her assailant's face from two seconds to a minute; then she looked away in fear for her life.

M.B.G.'s assailant finally managed to subdue her and proceeded to rape her.

On two separate occasions prior to trial, M.B.G. was hypnotized by Officer B. J. Lincecum of the Cape Girardeau Police Department. Under hypnosis, M.B.G. said that she saw the incident again, but added nothing to her prior description. M.B.G. viewed photo arrays on three separate occasions after the first time she was hypnotized. Respondent Little's picture was not included in any of these photo arrays. M.B.G. pointed to a picture in the October 16, 1980 photo array which she said resembled the assailant more than did the other pictures, but said the picture was not that of the rapist.

Sometime during September, 1980, M.B.G. was hypnotized for a second time by Officer Lincecum. M.B.G. was shown photo arrays on December 23, 1980. Little's picture was included in the photo array. M.B.G. picked Little's picture out of the photo array. Between December 25 and 31, 1980, M.B.G. was shown two more photographs—one of Little alone, and another showing Little prominently in a group shot. She again identified him as the assailant. On January 26, 1981, M.B.G. viewed a standing lineup of four persons. She picked out Little as the person who raped her. At trial, M.B.G. again made a positive identification of Little as the person who raped her.

Prior to trial, on March 20, 1981, Little filed a motion for authority to hire an expert witness (App. A104). In the motion, Little prayed that an expert in hypnotic interviews be appointed to assist him in preparation of his defense. On March 25, 1981, the Circuit Court of Cape Girardeau County, Stanley A. Grimm, J., held a motion hearing (App. A99). At the hearing, Little put on testimony from Patricia Schreiner, a secretary in the Circuit Public Defender's Office (App. A99). Ms. Schreiner testified as to the availability of funds in the Circuit Public

Defender's Office to hire an expert witness (App. A101). Ms. Schreiner testified that the Circuit Public Defender was in a poor position to hire its own expert (App. A101). The public defender representing Little asked for the expert "so that we can properly represent this defendant as to anticipated motions and present proper cross-examination at trial" (App. A102). The court, after hearing testimony on the motion, denied Little's motion.

At trial, M.B.G. positively identified Little as the person who raped her. She testified to her earlier identification of Little. After Little's conviction, he appealed to the Missouri Court of Appeals. The Missouri Court of Appeals for the Eastern District of Missouri reversed the convictions and remanded the case for a new trial. That court, because of a perceived conflict with a case from the Western District Court of Appeals, certified the case for transfer to the Missouri Supreme Court. The Missouri Supreme Court affirmed Little's conviction, holding that he had failed to prove that the identification testimony was tainted by impermissible suggestion. *See*, App. A37; *State v. Little*, 674 S.W.2d 541, 542 (Mo. banc 1984), *cert. denied*, 470 U.S. 1029, 105 S.Ct. 1398, 84 L.Ed.2d 786 (1985).[1]

Little filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 on November 15, 1985, in the United States District Court for the Eastern District of Missouri. On January 7, 1986, the District Court, H. Kenneth Wangelin, J., ordered that Little's petition be denied (App. A35). Respondent then filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit.

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1. Respondent Little, when he petitioned this Court for a writ of certiorari following the Missouri Supreme Court's ruling affirming his conviction, did not raise the issue raised in the instant petition.

On May 6, 1987, the Court of Appeals, Heaney, Floyd R. Gibson, JJ., and Hunter, Special J., reversed the district court's judgment and granted Little's petition. The panel found that admission of the victim's post-hypnotic identification testimony violated respondent's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution (App. A12). After the panel issued its opinion, the Warden petitioned for rehearing *en banc*. The Court of Appeals granted the Warden's petition and reheard the case. Following the rehearing, the Court of Appeals, *en banc*, issued its opinion, again reversing the district court and granting Little's petition (App. A1). In its opinion, the Court of Appeals, *en banc*, held that Little's rights under the Due Process Clause were violated when the trial court refused to grant his motion for a court-appointed hypnosis expert to aid him in preparing his case for trial. From the Court of Appeals' *en banc* opinion, the petitioner warden files the instant petition in this Court.

ARGUMENT

I.

Whether the Due Process Clause of the Fourteenth Amendment entitles an indigent defendant to the appointment, at state expense, of nonpsychiatric experts to assist in his defense at trial.

This petition presents two vital questions of federal constitutional law. This Court's resolution of these questions will undoubtedly have impact on the way criminal justice is dispensed in every court in this nation. Because of the gravity of the issues presented, there is a deepening conflict among the state and federal courts of this country.

As the petitioner warden will demonstrate, at least eight states have held contrary to the rule adopted by the United States Court of Appeals for the Eighth Circuit, *en banc*. Two states have held similar to the Eighth Circuit. Given that conflict and the importance of the issues raised in this petition, this Court should intervene by its grant of certiorari and resolve these questions.

The Court of Appeals, *en banc*, reversed the district court's denial of Respondent Little's petition for a writ of habeas corpus. In its decision, the Court of Appeals held that Little was denied his right to due process of law guaranteed by the Fourteenth Amendment when the trial court denied his motion for the appointment of an expert in hypnosis to assist him in his defense.

The Court of Appeals relied on this Court's decision in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), in coming to its conclusion. In finding Little was

entitled the appointment of an expert, at state expense, to assist him in his defense, the Court of Appeals stated:

> In *Ake v. Oklahoma* [cited above], the Supreme Court extended the definition of "basic tools [of an adequate defense]" to include the appointment of a psychiatric expert for a defendant in a capital case when the defendant's sanity would be a significant issue at trial. Failure to appoint an expert in such a case would be a denial of due process. . . .
>
> . . . We must first decide whether the rule of *Ake* should be applied at all in the present context, where the expert in question is not a psychiatrist, and the death penalty is not a possibility. We think the answer is yes.

Little, slip op. at 6 (App. A6-A7). The Eighth Circuit ruled the State had an obligation under the Due Process Clause to appoint a nonpsychiatric expert for Little. Clearly, however, the Eighth Circuit betrayed its thorough misunderstanding of this Court's ruling in *Ake* and wrongly applied the teaching of *Ake* to the present case. A brief glance at *Ake* will illuminate the Court of Appeals' error in this case.

Ake involved a criminal defendant, tried for first degree murder in Oklahoma. If convicted, Ake could have received the death penalty. At the guilt phase of trial, Ake's sole defense was insanity. There was no expert testimony for either side on Ake's sanity at the time of the offense, during trial. The jury was instructed that Ake was to be presumed sane at the time unless *he* presented evidence sufficient to raise a reasonable doubt about his sanity at the time of the offense. Prior to trial, Ake had asked the court to arrange for a state-appointed psychiatrist to examine Ake. The trial court rejected Ake's motion. Ake went to

trial. Without expert testimony to aid him, Ake was found guilty and sentenced to death.

This Court, on review of Ake's case, reversed his conviction. This Court held that the Due Process Clause required the appointment of a psychiatric expert to assist Ake. In making its decision, the Court considered three factors: first, the private interest in the accuracy of the criminal proceeding; second, the State's interest that will be affected if the assistance was to be provided; third, the probable value of the additional expert assistance, to the outcome of the trial. *See Ake*, 470 U.S. at 77.

Of course, the Court found the private interest in the accuracy of the criminal proceeding was high in Ake's case, since he faced the death penalty. *Id.* at 78. Next, the Court considered the State's interest in refusing to provide assistance. The Court held the State had no interest, beyond its interest in limiting the cost of criminal litigation, and the Court found that interest to be unsubstantial, in light of the compelling interest of both the State and individual in accurate disposition at trial. *Id.* at 78-79. Finally, the Court inquired into the probable value of the psychiatric assistance sought, and the risk of error in the proceeding if such assistance was not provided. The Court held that, because of the unique nature of psychiatry, and the vital interest of the defendant in marshalling sufficent evidence to support an insanity plea, the additional safeguard of expert assistance was necessary. *Id.* at 80.

There was, then, in *Ake* a confluence of factors tending to make the requirement of expert assistance a reasonable requirement. Significantly, the Court limited its holding to the necessity of providing "one competent psychiatrist

. . . as we limit the right we recognize today." *Id.* at 79. Moreover, the Court in *Ake* discussed at length the nature of the discipline of psychiatry, and especially the ability of the psychiatrist to investigate and provide the jury with information on the sanity of the defendant. *Id.* at 80-81. Finally, the Court recognized that it was dealing with a situation in which the defendant bore the burden of proof on the issue of insanity. *See, Id.* at 73, n. 1. The Court stated psychiatric testimony was indispensable, " 'if *an insanity plea* is to have any chance of success.' " *Id.* at 81 (*quoting, Gardner, The Myth of the Impartial Psychiatric Expert—Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy,* 2 Law and Psychology Rev., 99, 113-114 (1976) (emphasis added).

The Court in *Ake* was thus mindful of the unique factors present in the case and careful to limit its holding to the facts of that case. Since *Ake* was handed down, several state courts stayed within the carefully drawn parameters of the holding in *Ake;* those courts have ruled the Due Process Clause did not require the appointment of experts, other than psychiatrists where the defendant's sanity is at issue. *See, Ex parte Grayson,* 479 So.2d 76, 82 (Ala.), *cert. denied,* 106 S.Ct. 189 (1985) (forensic pathologist); *Rogers v. State,* 256 Ga. 133, 344 S.E.2d 644, 650 (Ga.), *cert. denied,* 107 S.Ct. 600 (1986) (criminal investigator); *Schultz v. State,* 497 N.E.2d 531, 533-534 (Ind. 1986) (serologist); *State v. Artis,* 316 N.C. 507, 342 S.E.2d 847, 851 (N.C. 1986) (juristic psychologist); *Plunkett v. State,* 719 P.2d 834, 839 (Okl. Cr.), *cert. denied,* 107 S.Ct. 675 (1986) (blood research scientist); *State v. Berry,* 76 Or.App. 1, 707 P.2d 638, 640 (1985) (anthropologist); *State v. Evans,* 710 S.W.2d 530 (Tenn. Crim. App. 1985) (ballistics expert);

Pope v. Commonwealth, 360 S.E.2d 352, 356 (Va. 1987) (criminal investigator). *But see, Coker v. State*, 412 N.W. 2d 589, 593 (Iowa 1987) (expert on intoxication should be granted); *In re Allen R.*, 127 N.H. 718, 506 A.2d 329, 331-332 (N.H. 1986) (juvenile proceedings; psychologist should be provided).

Nonetheless, the Eighth Circuit in the instant case brushed aside the mass of authority which confined *Ake* to its facts; the Eighth Circuit, in its effort, gave the carefully crafted analysis in *Ake* short shrift. The Court of Appeals held:

> There is no principled way to distinguish between psychiatric and non-psychiatric experts. The question in each case must be not what field of science or expert knowledge is involved, but rather how important the scientific issue is in the case, and how much help a defense expert could have given. Nor do we draw a decisive line for due-process purposes between capital and non-capital cases. To be sure, the defendant's interest in staying alive is greater and different in kind from his interest in avoiding a prison term, but the latter interest, in our opinion, still outweighs the state's interest in avoiding the relatively small expenditure that would be required.

Little, slip op. at 6-7 (App. A7).

The Eighth Circuit, then, failed to provide any of the Due Process analysis mandated by *Ake*. Had the Court done so, it would have discovered the factors present in *Ake* are not present here, while policy considerations exist here which did not exist in *Ake*. It is precisely that analysis which should lead this Court to grant certiorari and

quell the policy revolution the Eighth Circuit's opinion is bound to foment.

To begin with, the State interest, in refusing expert assistance, is far more extensive than the "relatively small expenditure" envisioned by the Eighth Circuit. As the *Ake* court recognized, a rule that the state must appoint one competent psychiatrist to assist the defense in a capital case, where insanity is an issue on which defendant bears the burden of proof, sets a relatively modest level of expenditure of state resources. *Ake*, 470 U.S. at 79. However, the Eighth Circuit's opinion turns the dial of state expenditure to an oppressively high setting. Under the Eighth Circuit's rule, state and federal governments must anticipate in every criminal case the defendants will seek some expert assistance. That possibility, combined with the minimum threshold showing of need the Eighth Circuit's opinion seems to require, raises a threatening spectre of motion after motion, hearing after hearing, expert after expert, fee bill after fee bill. Most certainly, fiscal resources and precious time will be drained from every government which continues to seek to try criminal cases.[2]

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2. The Court of Appeals for the Eleventh Circuit recently held:

> Requiring trial courts, both state and federal, to provide for expert assistance—through direct appointment or a grant of funds—would place a substantial, if not onerous, burden on the administration of criminal justice. For example, the trial court would have to (1) appoint a defense expert for every expert available to the government; (2) provide for expert assistance whether or not such assistance turned out to be needed; and (3) provide for any additional experts the appointed experts might need to explore theories that could aid the defense in cross-examining prosecution witnesses or in presenting the defense's case.

Moore v. Kemp, 809 F.2d 702, 712 n. 8 (11th Cir.) (*en banc*), *cert. denied*, 107 S.Ct. 2192 (1987).

Given the potential impact of the Court of Appeals' rule,[3] the sensible limits of the *Ake* opinion appear even wiser in retrospect. It is urgent this Court realistically assess the state interest in this case, and restore those sensible limits by its grant of certiorari.

The legitimate state interest outlined above is left unprotected by the Court of Appeals' opinion. Furthermore, the Court of Appeals' opinion is fatally flawed in that that court failed altogether to determine Little's interest, especially insofar as it compared to the defendant's interest in *Ake*. In *Ake,* the defendant bore the burden of proof as to his sanity. Unless he rebutted the presumption of sanity by sufficient evidence, the jury was instructed to presume his sanity at the time of the crime. *Ake,* 470 U.S. at 72-73. Accordingly, if no expert testified in Ake's behalf, he lost on the issue of sanity. *Id.* The court highlighted these factors in its determination of the case. *See, Id.* at 86. By contrast, in the present case Little bore no burden of proof. The state had the burden of proof on the issue of identification throughout the proceedings. Even if no expert testified on Little's behalf, Little nevertheless enjoyed the presumption of innocence. The state bore the obligation of presenting live, credible witnesses, while Little had no such obligation. Little, then, had an interest measure-

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3. Along with the danger that the number of situations in which the government will be forced to hire experts will substantially multiply comes an equally imposing danger: that defense attorneys will file essentially baseless motions, in the expectation that the motions will be denied, with the denied motions serving as the bases for future collateral attacks. Certainly as the attacks multiply, the state and federal governments will be drawn into costly collateral litigation on these claims. The stage is set as well for an increase in the frequency of claims of ineffective assistance of counsel for failure to request expert assistance prior to trial.

ably less compelling than the interest of the defendant in *Ake*. The protections of the Due Process Clause are thereby much less imperative in this case, as this Court should realize. This Court should fairly weigh Little's interest in its grant of certiorari and reverse the Eighth Circuit.

Finally, the Court of Appeals wrongly determined the impact on the accuracy of the outcome at trial of the expert's assistance in this case. The *Ake* court measured the ability of the psychiatric expert to come in and assist the defendant. The expert in *Ake* could examine the defendant, make a conclusion as to his sanity, present his finding and so shape by expert assistance the jury's fact-finding process. The expert's presence thereby "enable[d] the jury to make its most accurate determination of the truth on the issue before them." *Ake*, 470 U.S. at 81.

Unfortunately, the impact of expert assistance in this case would be much less significant. On this issue, the Court of Appeals held:

> . . . It is clear that an expert would have aided Little in his defense. The expert could have pointed out questions asked by Officer Lincecum [the hypnotist] which were suggestive or could have caused confabulation. The expert could have presented the limitations of hypnosis, [sic] and explained theories of memory. This would probably have had far more impact on the judge at the suppression hearing and the jury at trial than Little's lawyers' attempts at impeaching the state's expert by reading from one of the psychology textbooks he found at a college library,

> or using information developed from interviewing a professor of psychology.

Little, slip op. at 8-9 (App. A9).

Obviously, the Court of Appeals labored under some misconception as to the factual record available at the time of trial. There was no factual record of the hypnotic sessions in question since the Cape Girardeau Police Department had, by departmental policy, destroyed the tapes shortly after the sessions. Moreover, defense counsel was unsuccessful in bringing forth at trial the specific questions asked during the hypnotic session. Thus, the expert in this case would not have been in the same posture as the expert in the *Ake* scenario. In *Ake,* the expert would have been able to master the facts of the situation and marshall the defense accordingly. The expert in this case would have enjoyed no such ability. In fact, the expert could only have contributed speculation as to what questions were asked at the hypnotic session and their effect on the hypnotized witnesses. Moreover, any expert here would have been reduced to textbook assertions as to the dangers of hypnotic testimony. Those assertions would be of questionable relevance where the factual record as to what questions were actually asked during the hypnotic sessions was virtually nonexistent. The Court of Appeals' estimate of the value of expert assistance was overstated in view of the lack of record from which the expert could have worked. This Court should determine that the value of expert assistance in this case was sufficiently small when compared to the overwhelming state interest so that the Due Process Clause does not mandate expert assistance in this case. The Court can resolve this issue upon its grant of certiorari.

II.

Whether an indigent defendant was entitled under the Due Process Clause of the Fourteenth Amendment to the appointment of an expert at state expense absent a showing prior to trial that the expert assistance was likely to be a significant factor at trial.

Once the Court of Appeals in this case decided that the test of *Ake v. Oklahoma* was to be applied to the present situation, the court went on to find that Respondent Little had amply demonstrated the need for the expert at trial. The court found that "Leatrice Little demonstrated that an expert in hypnosis would have substantially aided his defense, and that denial of such expert would and did have a material impact on his trial." *Little, slip op.* at 7 (App. A8). Unfortunately, while it is true that *Ake* requires such a showing, Respondent Little made no such showing. That reason, along with the first reason for granting the writ, gives this Court sufficient justification to intervene via a grant of certiorari.

The *Ake* court recognized that expert assistance was not necessary in every case. The *Ake* court sought to place a limit on the right to expert assistance. The court held that in order to demonstrate that he was entitled to expert assistance, a defendant must make "an *ex parte* threshold showing to the trial court" that the subject of expert assistance "is likely to be a significant factor in his defense . . . ." *Ake*, 470 U.S. at 82. The Court again emphasized the requirement that a defendant show the necessity for expert assistance when it decided *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.

2d 231 (1985). In *Caldwell*, the court refused to consider Caldwell's argument based on the trial court's refusal to appoint various experts and investigators to assist him. The court refused to consider Caldwell's claim because, "[g]iven that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision." *Caldwell*, 105 S.Ct. at 2637 n. 1.

This Court has consistently required a showing, prior to trial, that the requested assistance would be significant to the defendant's case at trial. In this case, however, notwithstanding the Eighth Circuit's assertion to the contrary, Little made no pre-trial *ex parte* showing to the trial court that the requested assistance would have aided his defense significantly.[4] In fact, Little made no showing at all which related the expert assistance he sought to his chance of success at trial. As the court's hearing on Little's motion for authority to hire an expert witness reveals, *see*, Appendix at A99, the only showing Little made prior to trial was a showing that the Public Defender's Office lacked the funds to hire its own expert. Little made no effort to relate the employment of an expert to his opportunity to present a defense. Given Little's failure to develop any support for the notion that he required expert assistance, the trial court was justified in denying his request. The Court of Appeals should

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4. Little alleged in his "Motion to Hire Expert Witness" (App. A104) that the requested expert would help only to determine the "suggestibility" of the victim during hypnosis (App. A104). There was no factual record of any "suggestibility" of the victim during hypnosis, and defense counsel developed no factual record of suggestion, either at the motion hearing or during trial. Thus, the text of the pre-trial motion contains only "undeveloped assertions" per *Caldwell, supra.*

have held that Little failed to make the particularized showing of need required by *Ake* and *Caldwell*. Instead, the Court of Appeals, through the appellate court's gift of hindsight, reconstructed the events of trial so as to make Little's showing for him. *See, Little, slip op.* at 8-9 (App. A9-A10).[5]

Little's request for assistance, as evidenced by his pre-trial motions, offered "little more than undeveloped assertions" that expert assistance would be beneficial. *Caldwell, supra.* Little has failed to meet the test set forth in *Ake* and *Caldwell*. This Court should grant certiorari on this issue and reverse the judgment of the Court of Appeals.

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5. The Court of Appeals asserted that "the State called its own expert on hypnosis to testify at the suppression hearing." *Little, slip op.* at 9 (App. A10). This "expert" was none other than Officer Lincecum, the Cape Girardeau police officer who had conducted the hypnotic sessions. Significantly, Officer Lincecum did not testify at trial. The victim's identification of Little stood or fell based on whether the jury believed her testimony. Unlike *Ake* and equally unlike the impression left by the Eighth Circuit's opinion, the State did not confound Little with a battery of experts. At trial, on the issue of identification, it was the victim's identification, based on her glimpse of her attacker during the rape, which went to the jury. The Court of Appeals' finding that denial of Little's request "probably" had a material impact on the trial, is made weaker when the Court considers the context of the victim's identification.

CONCLUSION

Petitioner respectfully requests that this petition for a writ of certiorari be granted and that the Court of Appeals' judgment be reversed.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General
JOHN M. MORRIS III
Counsel of Record
Assistant Attorney General
PATRICK L. KING
(*Of Counsel*)
Assistant Attorney General
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-3321
Attorneys for Petitioner

APPENDIX

(Filed December 23, 1987)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1278

Leatrice Little,
Appellant,

v.

Bill Armontrout,
Appellee.

On Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: September 14, 1987

Filed: December 23, 1987

Before LAY, Chief Judge, HEANEY, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, and MAGILL, Circuit Judges, *en banc*.

ARNOLD, Circuit Judge.

Leatrice Little appeals the summary dismissal of his petition for a writ of habeas corpus, 28 U.S.C. §2254, by the District Court. Because we hold that Little's Fourteenth Amendment right to due process of law was vio-

lated when the state trial court refused to appoint an expert in hypnosis for him, we reverse.[1]

I.

On the evening of August 13, 1980, the victim, M.B.G., was raped in her apartment in Cape Girardeau, Missouri. The assailant entered her apartment, hid in her closet, and then attacked her when she opened the closet doors. He wore one of her blouses over his head during the assault. Though she did not mention it to the policewoman who came to her aid, M.B.G. told her sister that the blouse slipped for between two and 60 seconds, allowing her to see the man's face. M.B.G. said she saw a partial right profile of the defendant: his cheekbone, jaw, lips, nose, and eye.

Two days after the attack, M.B.G. was hypnotized by Officer B.J. Lincecum of the Cape Girardeau Police Department in the hope of enhancing her memory of the assailant. Officer Lincecum's only training in hypnosis was a four-day course he attended at the Law Enforcement Hypnosis Institute, Inc. M.B.G. was Officer Lincecum's twenty-seventh subject.

Officer Lincecum used the "TV screen" or third-person method of hypnosis, in which the subject is told to view the events as though they were taking place on a TV screen. The subject is supposed to be able to control the unfolding story as though it were on videotape; she can stop the action and zoom in for closeups. In a session lasting several hours, attended by M.B.G.,

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1. The opinion of a panel of this Court previously filed, 819 F.2d 1425, was automatically vacated when the petition for rehearing en banc was granted.

her sister, and the hypnotist, M.B.G. was unable to add to her previous description. At the end of the session, Officer Lincecum told M.B.G. that her memory of the event would improve. An audio tape was made of the session, but was destroyed 15 days later, pursuant to department regulations.[2]

M.B.G. was shown photographs of suspects on four occasions. On the first three, October 16, November 5, and November 10, Little's photo was not included. M.B.G. picked one picture out of the first group of photos, saying that it resembled the man who raped her. On December 23, 1980, M.B.G. was shown a photo array containing Little's picture. She picked Little as the man who raped her. Between December 25 and 31, when she was at the police station, M.B.G. was shown two other pictures of Little. Again, she identified him as her assailant. On January 26, 1981, M.B.G. viewed a lineup of six men. She quickly eliminated four, then picked Little after viewing the right profiles of the remaining two men.

The only substantial issue at trial was identification. M.B.G. testified that Little was her assailant. The maintenance man working the night M.B.G. was attacked said he saw a man resembling Little in the area. However, under cross-examination, he stated he was unsure of his identification. The maintenance man was hypnotized to improve his memory. A policeman patrolling nearby testified he saw Little jogging that night. When the policeman stopped the patrol car to speak to him, the man ran away. Defendant Little and several alibi witnesses testified that Little was 78 miles away in Poplar

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2. This regulation has since been changed.

Bluff when the crime took place. The jury found Little guilty of rape, Mo. Rev. Stat. §566.030.1, and burglary, Mo. Rev. Stat. §569.160. He was sentenced to 25 years in jail.

The Missouri Supreme Court affirmed, holding that no improper suggestion occurred during the identification. *State v. Little*, 674 S.W.2d 541, 543-44 (Mo. 1984) (en banc), *cert. denied*, 470 U.S. 1029 (1985).[3] The Court noted that Officer Lincecum was not involved in the investigation of the case, and that M.B.G. did not identify the accused until months after the session took place. The hypnotic session yielded no further information. The Court rejected Little's protests about the hypnotist's lack of qualifications, noting that there was no evidence that the officer's ineptitude, if any, had led to improper suggestion. The Court concluded that the witnesses did not act in a way indicative of improper suggestions.

Little argued that the reason he could not prove to the Court's satisfaction there had been improper suggestions was that the public defender's office, which represented him, did not have sufficient funds to hire an expert in hypnosis. The Court responded: "[t]here is a state university in Cape Girardeau with a faculty of Psychology and library facilities, and we are confident that a re-

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3. In 1985, the Missouri Supreme Court made hypnotically enhanced testimony inadmissible per se. *Alsbach v. Bader*, 700 S.W.2d 823 (Mo. 1985) (en banc). The Court stated that the use of hypnosis to aid recall does not meet the requirements of Missouri's version of the *Frye* test. *Id.* at 829 (citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (scientific evidence admissible only if it has gained general acceptance in its field). The Court went on to observe that much of the authority cited in the earlier Missouri case allowing hypnotic testimony, *State v. Greer*, 609 S.W.2d 423 (Mo. App. 1980), *vacated on other grounds*, 450 U.S. 1027 (1981), had been overruled. 700 S.W.2d at 825.

sourceful lawyer would not be helpless in obtaining expert information sufficient for a preliminary inquiry, at little or no expense." 674 S.W.2d at 544.

II.

On appeal to us from the District Court's denial of the writ, Little argues (1) that because of the pretrial hypnosis, M.B.G.'s identification testimony lacked the reliability necessary for admission into evidence consistent with due process; (2) that the use of hypnosis violated the defendant's Sixth Amendment right to confrontation; (3) that the deliberate destruction of the tape recordings of the hypnotic session deprived the defendant of his right to due process; and (4) that the trial court's refusal to appoint an expert for defendant violated his right to due process.[4]

The panel which originally heard this case, in a scholarly and comprehensive opinion, held, in substance, that M.B.G.'s identification testimony was so unreliable as to violate due process. Posthypnotic identification testimony is admissible, according to the panel opinion, only if (1) the hypnosis is properly conducted with scientifically recognized safeguards, and (2) the identification testimony is corroborated by other evidence. We find it unnecessary to go that far in order to hold that Little is entitled to a new trial. In our view, the denial of a state-provided expert on hypnosis to assist this indigent defendant rendered the trial fundamentally unfair and requires that the conviction be set aside. We deem it unnecessary to address the broader and more far-ranging issues about

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4. For the reasons given in the panel opinion, 819 F.2d at 1428, we reject the State's argument that Little has failed to exhaust his state remedies.

hypnotically enhanced testimony addressed by the panel opinion.[5] If the State chooses to try Little again (we understand he is now on parole), these issues may not recur, especially since, under *Alsbach v. Bader, supra,* hypnotically enhanced testimony is not now admissible in Missouri courts, as a matter of the state law of evidence. (We assume the rule of *Alsbach* would be applied by the state courts at any retrial of Little's case.)

When the state brings criminal charges against an indigent defendant, it must take steps to insure that the accused has a meaningful chance to present his defense. See *Douglas v. California,* 372 U.S. 353 (1963); *Griffin v. Illinois,* 351 U.S. 12 (1956). While the state need not provide the indigent with all the tools the wealthy may buy, it must provide the defendant with the "basic tools of an adequate defense." *Britt v. North Carolina,* 404 U.S. 226, 227 (1971). In *Ake v. Oklahoma,* 470 U.S. 68 (1985), the Supreme Court extended the definition of "basic tools" to include the appointment of a psychiatric expert for a defendant in a capital case when the defendant's sanity would be a significant issue at trial. Failure to appoint an expert in such a case would be a denial of due process. Justice Marshall, writing for the Court, noted that the defendant's interest in preventing an inaccurate determination of guilt would outweigh the state's interest in avoiding the additional cost in a case where

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5. After the panel opinion was filed, the Supreme Court held in *Rock v. Arkansas,* 107 S. Ct. 2704 (1987), that state courts may not exclude, on a per se basis, all hypnotically enhanced testimony offered by a criminal defendant. The Court expressly disclaimed any intention of ruling on the admissibility of hynotically enhanced testimony in other contexts, such as an offer of such testimony by the State from the victim of the crime - the issue presented here. *Id.* at 2712 n.15.

the assistance of an expert could reduce the risk of an erroneous outcome. *Id.* at 1094-95.

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Court declined to rule explicitly on whether the state had an obligation to appoint a nonpsychiatric expert for an indigent defendant. However, the Court based its decision on the fact that the defendant only baldly asserted his need for aid, making no showing as to the reasonableness of his request. *Id.* at 323 n.1. We must first decide whether the rule of *Ake* should be applied at all in the present context, where the expert in question is not a psychiatrist, and the death penalty is not a possibility. We think the answer is yes. There is no principled way to distinguish between psychiatric and nonpsychiatric experts. The question in each case must be not what field of science or expert knowledge is involved, but rather how important the scientific issue is in the case, and how much help a defense expert could have given. Nor do we draw a decisive line for due-process purposes between capital and noncapital cases. To be sure, the defendant's interest in staying alive is greater and different in kind from his interest in avoiding a prison term, but the latter interest, in our opinion, still outweighs the state's interest in avoiding the relatively small expenditure that would be required.

Ake and *Caldwell* taken together hold that a defendant must show more than a mere possibility of assistance from an expert. Rather, the defendant must show a reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial. *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir.) (en banc), *cert. denied*, 107 S. Ct. 2192 (1987);

see also *Vassar v. Solem*, 763 F.2d 975, 977 (8th Cir. 1985); *but see Stafford v. Love*, 726 P.2d 894 (Okla. 1986).[6] Leatrice Little demonstrated that an expert in hypnosis would have substantially aided his defense, and that denial of such expert would and did have a material impact on his trial.

While hypnosis has been accepted as a therapeutic tool since 1958, its role in criminal investigations and trials has remained controversial. See Council on Scientific Affairs, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 J.A.M.A. 1918 (1985), cited in *Rock v. Arkansas*, 107 S. Ct. 2704, 2713 (1987). Though studies have shown that hypnosis leads to an increase in a subject's recollections, both true and imagined memories may result. *Id.* Thus, some experts have concluded that while hypnosis is useful in investigation and establishing leads, it is less useful as a truth-determiner. See *People v. Hughes*, 59 N.Y.2d 523, 466 N.Y.S.2d 255, 453 N.E.2d 484, 489 (1983).

Three major characteristics of hypnosis can lead to inaccurate memories. The first is confabulation, the process by which the subject fills in gaps in her memory to make her recall more coherent. Sometimes the added information is accurate, other times it is purely imagined. The subject cannot distinguish between the true and imagined memories. The second problem is suggestibility. The subject wishes to please the hypnotist, so she answers questions the way the hypnotist wants, not necessarily

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6. The Oklahoma Supreme Court in *Stafford* agreed that a defendant desiring appointment of an expert must show the appointment would be reasonable and necessary. However, the Court did not believe a nonpsychiatric expert, a hypnotist, was required under *Ake*. For reasons stated in text, we disagree.

correctly. Suggestion by the hypnotist can be wholly unintended; he or she may suggest a response through tone of voice, demeanor, or body language.[7] The third problem is memory-hardening. Hypnosis gives the subject great confidence in the memories reviewed. Because she now believes in the accuracy of her memory, regardless of its actual truth, the witness will be difficult to shake under cross-examination. See generally *Rock v. Arkansas*, 107 S. Ct. at 2713, citing M. Orne, *et al., Hypnotically Induced Testimony, in Eyewitness Testimony: Psychological Perspectives* 171 (G. Wells and E. Loftus, eds. 1985); Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 Calif. L. Rev. 313, 333-342 (1980).

Given these perils of hypnotically enhanced testimony, it is clear that an expert would have aided Little in his defense. The expert could have pointed out questions asked by Officer Lincecum which were suggestive or could have caused confabulation. The expert could have presented the limitations of hypnosis, and explained theories of memory. This would probably have had far more impact on the judge at the suppression hearing and the jury at trial than Little's lawyer's attempts at impeaching the state's expert by reading from one of the psychology textbooks he found at a college library, or using information developed from interviewing a professor of psychology. As Justice (then Chief Judge) Cardozo once stated, a defendant is "at an unfair disadvantage if he is unable because of poverty to parry by his own [expert] witnesses

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7. One court thought suggestion may come about when a hypnotist tells his subject to do something as innocuous as remember everything clearly. This could cause the subject to turn an uncertain memory into a confident one. See *State v. Mack*, 292 N.W. 2d 764, 769 (Minn. 1980).

the thrusts of those against him." *Reilly v. Berry*, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929). The State called its own expert on hypnosis to testify at the suppression hearing. It should not have denied Little a similar weapon.

It is evident as well that denial of Little's request probably had a material impact on the trial. The only issue at trial was identification. The state's strongest witness was M.B.G., who had undergone hypnosis. The state used an expert to get the hypnotically enhanced testimony admitted. Officer Lincecum testified about hypnosis generally, and as it was applied to M.B.G. Little's only hope was to impeach Officer Lincecum with a library-gained knowledge of hypnosis.

We are mindful of the finding of the Supreme Court of Missouri that there was simply no evidence of improper suggestiveness during any of the hypnotic sessions conducted in this case. It would follow that an expert would have contributed nothing useful. His testimony would simply have been irrelevant. Our first impulse was to defer to this finding, but on reflection we conclude that we cannot. M.B.G. did not identify Little until after being hypnotized. She had glimpsed only the right profile of the criminal, and had done so only for a time period so short as to be described by the Missouri Supreme Court as "at least two seconds . . . ." 674 S.W.2d at 542. The police hypnotist told her that hypnosis would improve her memory, and in fact her memory did later improve, or at least she thought it did. We think an expert witness could well have explained to the judge and jury how M.B.G. could have been influenced by improper suggestion, even without Lincecum's intending it or her realizing it. The conclusion that there was no improper suggestion or other taint could well itself have been different if Little had been given expert assistance.

III.

The judgment of the District Court must be reversed, and the cause remanded to that Court with directions to grant the writ, setting aside Little's conviction and freeing him unconditionally from state supervision, unless the State commences proceedings to retry him within such reasonable time as the District Court may fix. If the State chooses to try the case again, and if it seeks to introduce identification testimony from M.B.G., Little must be given a reasonable chance, out of the presence of the jury, to show that that testimony was influenced or enhanced by hypnosis. In attempting to make this showing, he must have the assistance of a state-provided expert, for reasons we have given. If he succeeds in making this showing, we assume that M.B.G.'s identification testimony will be excluded, under the new rule of the *Alsbach* case. If he fails to make such a showing, M.B.G. may give her identification testimony.[8]

Reversed and remanded with instructions.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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8. We reject Little's argument that destruction of the tapes of the hypnotic sessions violated due process. It has not been shown that the tapes had an exculpatory value that was apparent before they were destroyed. See *California v. Trombetta*, 467 U.S. 479 (1984). Little's further argument that hypnosis has so far obscured his ability to cross-examine M.B.G. as to violate the Confrontation Clause of the Sixth Amendment, as applied to the states by the Due Process Clause of the Fourteenth Amendment, should not recur at any new trial, because if hypnosis is shown to have been that important a factor, M.B.G.'s identification testimony will presumably be excluded as a matter of state law.

(Decided May 6, 1987)

Leatrice LITTLE,
Appellant,

v.

Bill ARMONTROUT,
Appellee.

No. 86-1278.

United States Court of Appeals, Eighth Circuit.

Submitted Nov. 12, 1986.

Decided May 6, 1987.

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Before HEANEY, Circuit Judge, and GIBSON, Floyd R., Senior Circuit Judge, and HUNTER,* Senior District Judge.

ELMO B. HUNTER, Senior District Judge.

Appellant-Petitioner Leatrice Little appeals the summary dismissal of his petition for a writ of habeas corpus, 28 U.S.C. § 2254, by the United States District Court for the Eastern District of Missouri. Little contends that he is confined in state custody in violation of his Constitutional rights. This court has jurisdiction pursuant to 28 U.S.C. § 2253.

We reverse the district court's dismissal of Little's Petition and grant a Writ of Habeas Corpus. We hold

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*The HONORABLE ELMO B. HUNTER, Senior United States District Judge for the Western District of Missouri, sitting by special designation.

that Little's right to due process of law guaranteed by the fourteenth amendment was violated by admitting the victim's posthypnotic identification testimony into evidence at trial. Because of our holding, we do not reach the merits of the other three issues asserted by Little in this appeal.[1]

I. FACTS

On the evening of August 13, 1980, the victim, M.B.G., was raped in her apartment in Cape Girardeau, Missouri. Her assailant entered her apartment through a window, hid in a closet and attacked her when she opened the closet doors. The assailant was wearing one of M.B.G.'s blouses wrapped around his head and another of her blouses around his torso.

M.B.G., in an attempt to escape, fled to her living room. Before she could open her front door, the assailant grabbed her from behind and pulled her away from the door. A struggle ensued. Eventually M.B.G. was thrown onto a chair and raped. During the struggle, M.B.G. noticed that the assailant's hands were black. She later told her sister that the blouse wrapped around her assailant's head had slipped off for anywhere from two to sixty seconds.

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1. The other points raised by Little on this appeal are:

(1) the pretrial hypnosis of the victim violated his sixth amendment right to confront witnesses against him;

(2) the state's deliberate erasure of the audio tape of the victim's first hypnotic session violated his fourteenth amendment right to due process of law and his sixth amendment right to effective assistance of counsel; and

(3) the trial court's refusal to appoint a forensic hypnotist violated his sixth amendment right to effective assistance of counsel and his fourteenth amendment right to equal protection of the laws.

Little dropped a fifth issue prior to oral argument.

During this time, she was able to view a partial right profile of his face including, "his cheekbone, his jaw, his lips, his nose, [and] his eye".

A policewoman, responding to M.B.G.'s screams for help, interrupted the attack when she knocked at M.B.G.'s door. By the time M.B.G. was able to open her apartment door, her assailant had fled through an open window. M.B.G. described the assailant to the policewoman as a young, broad-shouldered black man with a slender body, 16 to 20 years of age, weighing 145 pounds and approximately 5 feet 7 inches tall.

Another officer, Lieutenant Ross, who was patrolling the area, heard about the rape on a police broadcast. At approximately the same time, he saw a man resembling M.B.G.'s description of the rapist approaching on the sidewalk. Lieutenant Ross slowed his patrol car and then turned around to talk with the man. The man on the sidewalk, however, ran down an alley and Lieutenant Ross was unable to locate him.

Two days later, on August 15, 1980, M.B.G. was hypnotized by Officer B.J. Lincecum of the Cape Girardeau Police Department. The session lasted several hours. The purpose of the session was to enhance M.B.G.'s recall of the identity of her assailant. M.B.G. was unable, under hypnosis, to add any detail to the description she had previously given of the assailant. An audio tape was made of the session, but it was erased fifteen days later pursuant to departmental policy.

M.B.G. viewed photographic displays on October 16, November 5, and November 10, 1980, in an attempt to identify her assailant. Little's picture was not included in any of these displays. During the October 16, 1980,

photographic display, M.B.G. picked out a picture of someone other than Little who she thought resembled her assailant.

Sometime during December, 1980, M.B.G. was hypnotized, for a second time, by Officer Lincecum. M.B.G. testified that she underwent hypnosis this time because she was having difficulty sleeping. Officer Lincecum testified that the case was not discussed during the hypnotic session. There was no record made of this session.[2]

She next was shown photographic displays on December 23, 1980. Little had become a suspect in the rape sometime in November or December. She picked Little's picture out of the display. Between December 25 and 31, 1980, she was shown two more photographs, one of Little alone and the other showing him prominently in a group shot. She again identified him as the assailant. On January 26, 1981, M.B.G. viewed a body lineup of six persons. She immediately eliminated all but two of the persons. She then picked Little out as the rapist after viewing his right profile.

Little was convicted of rape, § 566.030.1 R.S.Mo.1978, and burglary, § 569.160 R.S.Mo.1978, after a jury trial in the Circuit Court of Cape Girardeau County, Missouri. He was sentenced to consecutive terms of twenty years on the rape conviction and five years on the burglary conviction. The Missouri Court of Appeals for the Eastern District of Missouri reversed the convictions and remanded the case for a new trial. That court, because of a perceived conflict with a case from the Western District

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2. It should be noted that Officer Lincecum stated that during the training course he attended he was taught not to use hypnosis for therapeutic purposes.

Court of Appeals,[3] certified the case for transfer to the Missouri Supreme Court. The Missouri Supreme Court affirmed Little's conviction holding that he had failed to prove that the identification testimony was tainted by impermissible suggestion. *State v. Little,* 674 S.W.2d 541, 542 (Mo.1984) (banc), *cert. denied,* 470 U.S. 1029, 105 S.Ct. 1398, 84 L.Ed.2d 786 (1985).[4]

As mentioned, Officer Lincecum of the Cape Girardeau Police Department conducted both of the hypnotic sessions of M.B.G. He joined the department in 1976. His training in hypnosis consists of a four-day class conducted by Dr. Martin Reiser[5] of the Law Enforcement Hypnosis Institute, Inc. The class met for eight to nine hours a day and involved some practical exercises where the students were divided into groups and took turns playing the roles of hypnotist, subject, and observer. This four-day course was Lincecum's only training in the field of hypnosis. M.B.G. was the 27th subject that

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3. The Western District Court of Appeals case was *State v. Greer,* 609 S.W.2d 423 (Mo.Ct.App. 1980), *vacated on other grounds,* 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981).

4. The Missouri Supreme Court, since the *Little* decision, has declined to follow *Greer,* which held that hypnosis affects credibility but not admissibility. The Court in *Alsbach v. Bader,* 700 S.W.2d 823 (Mo.1985) (banc), adopted the per se inadmissible approach for hypnotically-enhanced testimony. The Court concluded that the use of hypnosis to aid recall does not meet the requirements of Missouri's version of the *Frye* test. *Id.* at 824. The Court further noted that much of the authority in *Greer* cited by the Missouri Court of Appeals for the proposition that hypnosis affects credibility but not admissibility has been overruled.

5. Dr. Reiser is the Director of Behavioral Science Services of the Los Angeles Police Department. Law Enforcement Hypnosis Institute, Inc., is a proprietary school in Los Angeles that teaches courses in hypnosis to police and other law enforcement personnel. He has testified in a number of criminal trials as a proponent of hypnotically aided recall. *See State v. Shirley,* 31 Cal.3d 18, 181 Cal.Rptr. 243, 266, 723 P.2d 1354, 1377 (1982).

Lincecum had hypnotized since his training course. In conjunction with the case, Officer Lincecum also hypnotized three other persons.[6] When hypnotizing the victim, Officer Lincecum utilized the third person or "TV screen" technique. This technique asks the subject to view the event as though it was occurring on a television screen. This apparently allows the subject to stop the event and focus in on any specific details that are in question.

Since no record was kept of either hypnotic session, both the trial court and petitioner Little were forced to rely on the testimony of those present at each session to determine what happened during each session. M.B.G., her sister, and Officer Lincecum were the only persons present during the entire first hypnotic session. Officer Geracke, a special officer with the department for the investigation of rape cases, was in and out of the room during the session. Each of these persons testified that Lincecum did not suggest a description of the rapist during the session. Officer Lincecum did tell M.B.G. during the first session that she would see the event as it was happening and that she would be able to remember what she wanted to. As noted, Officer Lincecum testified that the case was not discussed in the second session.

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6. He also hypnotized Joe Mosby, a maintenance man at the victim's apartment; Lieutenant Ross, the police officer who shortly after the attack saw a jogger slightly fitting the victim's initial description of her assailant; and Gary Niswonger, a Southeast Missouri State University campus security guard who saw a man at a quick market in October who resembled a police composite of the assailant. There is nothing in the record that indicates how the composite came into existence.

II. EXHAUSTION

The State contends that Little failed to exhaust all of his habeas claims in state court.[7] Thus, it argues that Little had a mixed petition of exhausted and unexhausted claims which the district court properly dismissed. *See Rose v. Lundy,* 455 U.S. 509, 522, 102 S.Ct. 1198, 1205, 71 L.Ed.2d 379 (1982). We disagree with this characterization of the Petition.

To exhaust his state remedies a habeas petitioner only needs to have " 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim[s]." *See Anderson v. Harless,* 459 U.S. 4, 6, 103 S.Ct. 276, 277, 75 L.Ed.2d 3 (1982) (per curiam); *see also Picard v. Conner,* 404 U.S. 270, 276-277, 92 S.Ct. 509, 512-13, 30 L.Ed.2d 438 (1971). We have examined each of the four claims asserted by Little in his Petition and find that each was either expressly raised by him in state court proceedings or discussed by the state courts. Thus, Little provided the state courts with a "fair opportunity" to rule upon each of the four claims presented in his Petition.

III. HYPNOSIS

As mentioned, the first issue raised by Little is that his fourteenth amendment right to due process of law was violated by the admission of the victim's posthypnotic identification testimony. Before directly addressing that question, we will first discuss some of the problems associated with using hypnotically-enhanced testimony and

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7. This issue is being raised for the first time on appeal because the district court dismissed the Petition on the merits without requiring the state to respond to the Petitioner's application for habeas corpus relief.

then look at the various approaches adopted by courts to deal with such testimony.

A. Problems Associated with Hypnosis

Two theories have been hypothesized regarding the human memory and its interaction with hypnosis. One is the retrieval theory. A chief proponent of this theory is Dr. Martin Reiser, the person who taught hypnosis to Officer Lincecum. The basic tenet of this theory is that the human memory accurately records and stores the details of each experience. The use of hypnosis allows the subject to reach back in his memory and recall additional details. M. Reiser, *Handbook of Investigative Hypnosis* (1980). Proponents of this theory analogize the human memory to a video recorder "capable of 'playing back' the exact images or impressions it has received." *People v. Shirley,* 641 P.2d 775, 781 repub. 31 Cal.3d 18, 181 Cal.Rptr. 243, 723 P.2d 1354 (Cal. 1982). This theory is rejected by many scientists who work in the field. *See* F. Bartlett, *Remembering,* (1932, reprinted 1964); D. Hintzman, *The Psychology of Learning and Memory* (1978); F. Loftus, *Eyewitness Testimony* (1979); see also testimony of Dr. Donald W. Shafer in *People v. Shirley,* 641 P.2d at 781.

The second is the construction theory. The basic tenet of this theory is that the memory of any given event is constructed of and influenced by many factors. F. Bartlett, *Remembering* 213 (1932, reprinted 1964). The memory of an event is reconstructed based on a person's perception of the event in relation to other experiences. *Id.* at 213. Proponents of this theory argue that "the past is being continually remade [and] reconstructed in the interest of the present." *Id.* at 309. Thus, the opera-

tion of memory recall often produces erroneous responses. F. Loftus, *Eyewitness Testimony* 86-87. In a comprehensive review of the clinical data concerning the use of hypnosis as an aid to recall,[8] Dr. Martin Orne, a major proponent of this theory, emphasized that the use of hypnosis exacerbates the problems of normal recall.[9] His research indicates that hypnotically "refreshed" subjects tend to be even more responsive to leading questions, resulting in more error and, as a result of the hypnotic process, more subjectively confident in the accuracy of their recall. Experts have identified several specific problems associated with hypnotically stimulated recall and its accuracy. These problems include suggestibility, confabulation, pseudomemory, memory hardening, source amnesia, and a loss of critical judgment.

A person in a hypnotic trance is subject to a heightened degree of suggestibility. The source of the suggestion could be subtle verbal or nonverbal cues given by the hypnotist of which even he is not aware. The form of the suggestion can vary from the hypnotist's voice inflection, body movement or the form of the question. Additionally, any suggestions may be heightened by either the subject's perception that hypnosis will aid in or provide a more accurate recall or by a desire to please the hypnotist. *People v. Shirley*, 641 P.2d at 803.

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8. Orne, Hypnotically Induced Testimony, in *Advances in the Psychology of Eyewitness Testimony* (G.L. Wells & E.F. Loftus, eds.) (Boston Cambridge University Press 1984).

9. Dr. Orne argues that hypnosis can either increase the inaccuracy of recollections (through misleading information) without diminishing confidence in these "memories", or it can actually increase confidence in memory reports without also increasing accuracy. The amount of confidence and belief an individual associates with his or her remembrances, he contends, is more a function of hypnotic responsiveness than recall.

A second problem associated with hypnotically refreshed recall is "confabulation". Confabulation occurs when an individual fills in details of gaps in his or her memory of an experience. These details, while plausible, consist of either irrelevant actual facts taken from an unrelated prior experience or a fantasy. *Shirley,* 641 P.2d at 805; *Harker v. Maryland,* 800 F.2d 437, 440 (4th Cir.1986); *State v. Hurd,* 86 N.J. 525, 432 A.2d 86, 93 (1981). It is impossible for anyone, including the subject or a psychiatrist or psychologist with extensive training in the field of hypnosis, to determine whether a particular piece of information is actual memory or confabulation, absent independent verification such as a record being made of the subject's memory before the hypnosis session. Orne, *The Use and Misuse of Hypnosis in Court,* 27 Int. J. Clinical & Experimental Hypnosis 311, 317-318 (1979).

A third problem, related to the concept of confabulation, is that hypnosis may create a "pseudomemory" in the hypnotized individual. After being hypnotized, the individual believes that his posthypnotic recall of the event accurately reflects the event itself. Thus, he emerges with a false or inaccurate memory of the experience which was the subject matter of the hypnosis session. A recent study found that most information additionally recalled under hypnosis is erroneous. *See* Dwyan & Bowers, *The Use of Hypnosis to Enhance Recall,* 22 Science 184 (1983).[10]

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10. Whether hypnosis is an aid to eyewitness identification has been the subject of two recent studies. The conclusion from the first study was that hypnosis had no effect on eyewitness identification. Wagstaff, Traverse & Millner, *Hypnosis and Eyewitness Memory—Two Experimental Analogues,* 10 IRCS Medical Science: Psychology and Psychiatry 894 (1982). The

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A fourth problem identified by the experts is "memory hardening", a concept which refers to the hypnotized individual's subjective conviction that the memory after hypnosis is accurate. Memory hardening is exacerbated

> by two techniques commonly used by lay hypnotists: before being hypnotized the subject is told (or believes) that hypnosis will help him to 'remember very clearly everything that happened' in the prior event, and/or during the trance he is given the suggestion that after he awakes he will 'be able to remember' that event equally clearly and comprehensively.[11]

People v. Shirley, at 803-804.

The problem of memory hardening is compounded by its interrelationship with the pseudomemory.

> Another problem is source amnesia.
>
> [T]he police may tell a witness something just before hypnosis and then hypnotize him. When he awakes, his 'source amnesia' may lead him to believe that the police statement was a product of his own memory. Sometimes communications made to the patient after hypnosis may be retroactively integrated into the hypnotic recall. The subject may recall a fact with no

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Footnote continued—

conclusion drawn from the second study, however, was that hypnosis caused significantly more error in eyewitness identification. Sanders & Simmons, *The Use of Hypnosis to Enhance Eyewitness Accuracy: Does it work?*, 68 J.App.Psychol. 70 (1983).

11. Such suggestions are recommended by police hypnosis manuals. E.g., Reiser, *Handbook of Investigative Hypnosis,* Ch. 40 (1980). That type of suggestion was given to M.B.G. by Officer Lincecum when he told her that she would see the event as it was happening and be able to remember what she wanted to.

> awareness that it was not the product of his own mind. Or he may recall being told that fact, but insists that he had prior knowledge of it. This often happens when subjects are shown photographs or lineups for identification just before or just after hypnotic sessions.[12]

Diamond, *Inherent Problems in the Use of Pretrial Hypnosis in a Prospective Witness,* 68 Cal.L.Rev. 313, 336 (1980).

A sixth problem is the subject's loss of critical judgment. An individual loses critical judgment in that he is more apt to speculate about the details of an experience while under hypnosis and later give credence to those details than he would if relying on normal memory recall processes.[13]

B. Treatment of Hynotically Induced Testimony by the Courts

Three major approaches to the admission of hypnotically-enhanced testimony have been adopted by various courts. The approach adopted by a particular court generally reflects its perception of the degree to which the above-mentioned problems affect a person's memory of an event.

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12. Source amnesia may be present in this case. M.B.G. first identified Little during a photographic lineup on December 23, 1980. And, while the exact date is not known, her second hypnosis session occurred sometime in December, 1980.

13. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness,* 68 Cal.L.Rev. 313, 355, 337-338 (1980); Orne, *Use and Misuse* 316-320; Putnam, *Hypnosis and Distortions in Eyewitness Testimony,* 27 Internat.J. Clinical & Experimental Hypnosis 437, 446 (1979). Gibson, *Hypnosis: Its Nature and Therapeutic Uses* 58-59 (1977); Hilgard, *Hypnotic Suggestibility* 9 (1965); Hull, *Hypnosis and Suggestibility* 111-115 (1933).

The first approach permits the admission of such testimony. Courts adopting this approach state that hypnosis affects credibility but not admissibility.[14] This approach was announced in the seminal case of *Harding v. State*, 5 Md.App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949, 89 S.Ct. 2030, 23 L.Ed.2d 468 (1969). A basic tenet of this approach is that hypnotically-enhanced recall is similar to ordinary recall. Thus, it is assumed that any inaccuracies in the recall testimony can be discovered and cured by skillful cross-examination, the testimony of expert witnesses and the use of carefully drawn cautionary instructions. *See, e.g., Chapman v. State*, 638 P.2d 1280, 1282-84 (Wyo.1982). This approach has become somewhat circumspect since much of the early authority adopting this approach has been overruled either on appeal or by later case law.[15]

The second approach permits the use of hypnotically-enhanced recall as long as the proponent of the testimony establishes compliance with certain procedural safe-

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14. See *Clay v. Vose*, 771 F.2d 1 (1st Cir.1985), *cert. denied*, ... U.S. ....., 106 S.Ct. 1212, 89 L.Ed.2d 324 (1986); *United States v. Awkard*, 597 F.2d 667 (9th Cir.1979), *cert. denied*, 444 U.S. 885, 100 S.Ct. 179, 62 L.Ed.2d 116 (1979); *United States v. Adams*, 581 F.2d 193 (9th Cir.1978), *cert. denied*, 439 U.S. 1006, 99 S.Ct. 621, 58 L.Ed.2d 683 (1978); *United States v. Narciso*, 446 F.Supp. 252 (E.D.Mich.1977); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240 (1974); *State v. Wren*, 425 So.2d 756 (La. 1983); *State v. Brown*, 337 N.W.2d 138 (N.D.1983); *State v. Glebock*, 616 S.W.2d 897 (Tenn.Crim.App.1981); and *Chapman v. State*, 638 F.2d 1380 (Wyo.1982).

15. *See Harding v. State*, 5 Md.App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949, 89 S.Ct. 200, 23 L.Ed.2d 468 (1969), overruled by *Collins v. State*, 52 Md.App. 186, 447 A.2d 1272 (1982), *aff'd*, 296 Md. 670, 464 A.2d 1028 (1983); *People v. Hughes*, 99 Misc.2d 863, 417 N.Y.S.2d 643 (1979), overruled by *People v. Hughes*, 88 A.D.2d 17, 452 N.Y.S.2d 929 (N.Y.App. Div.1982); and *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978), overruled by *State v. Peoples*, 311 N.C. 515, 319 S.E.2d 177 (1984).

guards.[16] *State v. Hurd*, 86 N.J. 525, 432 A.2d 86, decided by the New Jersey Supreme Court is the leading case applying this approach. The *Hurd* court set forth the following procedural safeguards: (1) a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session; (2) the hypnotist must be independent of the parties to the lawsuit; (3) any information given to the hypnotist by law enforcement personnel or a party to the action prior to the hypnosis must be recorded; (4) the hypnotist should obtain from the subject a detailed description of the facts as remembered by the subject prior to the hypnosis; (5) all contacts between the hypnotist and the subject must be recorded; and (6) only the hypnotist and the subject should be present during all phases of the hypnotic session. Almost all other jurisdictions adopting this approach have utilized the *Hurd* safeguards or a variable of those safeguards.

The third approach bars the use of hypnotically-enhanced or refreshed testimony.[17] Many of the courts

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16. *See Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112 (8th Cir.1985); *United States v. Valdez*, 722 F.2d 1196 (5th Cir.1984) (inadmissible per se under facts of case); *People v. Smrekar*, 68 Ill.App.3d 379, 24 Ill.Dec. 707, 385 N.E.2d 848 (1979); *State v. Iwakiri*, 106 Idaho 618, 682 P.2d 571 (1984); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981); *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (1981); *State v. Armstrong*, 110 Wis.2d 555, 329 N.W.2d 386, *cert. denied*, 461 U.S. 946, 103 S.Ct. 2125, 77 L.Ed.2d 1304 (1983). Oregon has adopted by statute similar procedural requirements. *See Or.Rev.Stat.* § 136.675 (1981).

17. *See State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982) (banc); *People v. Shirley*, 31 Cal.3d 18, 181 Cal.Rptr. 243, 641 P.2d 775, *cert. denied*, 459 U.S. 860, 103 S.Ct. 133, 74 L.Ed.2d 114 (1982); *People v. Quintanar*, 659 P.2d 710 (Colo.App.1982); *Bundy v. State*, 471 So.2d 9 (Fla.1984); *State v. Seager*, 341 N.W.2d 420 (Iowa 1983) (admits testimony only if sufficiently similar to prehypnotic statements); *State v. Haislip*, 237 Kan. 461, 701 P.2d 909 (1985); *Collins v. State*, 52

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holding that hypnotically-aided recall is inadmissible per se premise their holding on the *Frye* test as adopted by their jurisdiction. *E.g., People v. Shirley,* 641 P.2d 775; *Alsbach v. Bader,* 700 S.W.2d 823. The *Frye* test generally predicates the admission of evidence based on a scientific theory or principle on that theory or principle having achieved general acceptance in the relevant scientific community. *Frye v. United States,* 293 F. 1013 (D.C. Cir.1923). These jurisdictions reject the procedural safeguard approach as being inadequate to protect against many of the dangers inherent in the hypnotic process.[18] Several of the jurisdictions which follow either this or the procedural safeguards approach admit testimony of the prehypnotic memory of the event, or testimony of subjects not covered during the hypnosis even if the posthypnotic testimony is not admissible. *See, e.g., State ex rel. Collins v. Superior Court,* 132 Ariz. 180, 644 P.2d 1266 (1982) (banc).

While this is a criminal case of first impression in this circuit, we recently held that in a civil case testimony derived from hypnotically-enhanced recall is admissible if the proponent of the testimony establishes the

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Footnote continued—

Md.App. 186, 447 A.2d 1272 (1982), *aff'd,* 296 Md. 670, 464 A.2d 104 (1983); *People v. Gonzales,* 108 Mich.App. 145, 310 N.W.2d 306 (1981), *aff'd,* 415 Mich 615, 329 N.W.2d 743 (1982); *State v. Mack,* 292 N.W.2d 764 (Minn.1980); *Alsbach v. Bader,* 700 S.W.2d 823 (Mo.1985) (banc); *State v. Palmer,* 210 Neb. 206, 313 N.W.2d 648 (1981); *People v. Hughes,* 59 N.Y.2d 523, 466 N.Y.S.2d 255, 453 N.E.2d 484 (1983); *State v. Peoples,* 311 N.C. 515, 319 S.E.2d 177 (1984); *Commonwealth v. Nazarovitch,* 496 Pa. 97, 436 A.2d 170 (1981).

18. Virtually all of the safeguards are designed to protect against suggestibility. *Shirley,* 641 P.2d at 787. Thus, there are few, if any, proposed safeguards which protect against such known problems as confabulation, pseudomemory, memory hardening and the loss of critical judgment.

reliability of that testimony. *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112 (8th Cir.1985). In *Sprynczynatyk*, we stated that trial courts should consider the following factors when making that determination: (1) whether and to what degree procedural safeguards[19] have been utilized; (2) the appropriateness of using hypnosis for the kind of memory loss involved; and (3) whether there is any evidence to corroborate the hypnotically-enhanced testimony. *Id.* at 1123. If the court determines that the testimony is sufficiently reliable, it must, of course, still consider whether its probative value outweighs its prejudicial effect. *Id.* at 1223.[20]

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19. *Sprynczynatyk*, 771 F.2d 1112 (8th Cir.1986). The safeguards suggested are:

> (1) The hypnotic session shall be conducted by an impartial licensed psychiatrist or psychologist trained in the use of hypnosis and thus aware of its possible effects on memory so as to aid the prevention of improper suggestions and confabulation. Appointment of the psychiatrist or psychologist should first be approved by the trial court. . . . (2) Information given to the hypnotist by either party concerning the case should be noted, preferably in written form, so that the extent of information the subject received from the hypnotist may be determined. (3) Before hypnosis, the hypnotist should obtain a detailed description of the facts from the subject, avoiding adding new elements to the subject's description. (4) The session should be recorded so a permanent record is available to ensure against suggestive procedures; Videotape is a preferable method of recordation. (5) Preferably, only the hypnotist and subject should be present during any phase of the hypnotic session, but other persons should be allowed to attend if their attendance can be shown to be essential and steps are taken to prevent their influencing the results of the session.

Id. at 1123 n. 14. After announcing these safeguards, we cautioned that "[i]n adopting this approach we do not hold that if the safeguards were followed the testimony is always admissible, nor do we interpret the rule to mean that if some of the safeguards were not followed the testimony is never admissible. *Id.* at 1123 n. 16.

20. Because of the different burden of proof and constitutional issues present in a criminal case, we do not consider the

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IV. ADMISSIBILITY OF M.B.G.'s POSTHYPNOTIC IDENTIFICATION TESTIMONY

The linchpin in determining the admissibility of identification testimony in a criminal trial is reliability. *Manson v. Brathwaite,* 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977). If the identification procedure used is unduly suggestive, it deprives the defendant of a fair trial and due process of law. *Id.* at 102-114. An identification procedure is impermissibly suggestive if it gives rise to a very substantial likelihood of irreparable misidentification. *Simmons v. United States,* 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968). The court must determine whether under "the totality of the circumstances" an identification is reliable. *Stovall v. Denno,* 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967).

> [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972).

Footnote continued—

test announced in *Sprynczynatyk* to necessarily be the test to be applied in criminal cases. However, the *Sprynczynatyk* test and its procedural safeguards do, as implied below, provide helpful guidelines for an inquiry into whether or not the posthypnotic recall of a witness in a criminal case is constitutionally reliable.

"Against these factors is to be weighed the corruptive effect of the suggestive identification itself." *Manson v. Brathwaite,* 432 U.S. at 114, 97 S.Ct. at 2253.

M.B.G. testified that for anywhere from 2 to 60 seconds she was able to see a partial right profile of her assailant's face. This allowed her to see his cheekbone, jaw, lips, chin, nose and eye. The rape occurred in the early evening hours of August 13, 1980. Sunlight was coming through the living room window. Thus, M.B.G. had an opportunity to get at least a partial view of her assailant.

M.B.G. identified Little as her assailant from a photo lineup approximately four months after the rape. She later viewed two other photographs of Little and again she identified Little as her assailant. In January of 1981 she picked Little out of an in person lineup. Her identification of him at trial was unequivocal.

On the other hand, M.B.G. testified she avoided staring at her assailant when the blouse slipped off his head for fear of suffering physical harm. Furthermore, while M.B.G. stated that the attack lasted between 35 to 40 minutes, her initial description of the assailant did not fit petitioner. She initially described her assailant as a young, broad-shouldered black, slender body, 145 pounds, 5 feet 7 inches tall, and between the ages of 16-20. Little was 25 years old, 175 pounds and 5 feet 11 inches at the time of the attack. It is important to note that M.B.G. determined her assailant's height by comparison to her own height. M.B.G. is approximately 5 feet 8 inches tall.

While these factors, in some respects, tend to show that M.B.G.'s identification of Little as her assailant was somewhat suspect, alone they do not warrant a finding

that her identification testimony was constitutionally unreliable. Moreover, they really are not even necessary to decide this case. The corruptive effect of the suggestive identification procedure, in and of itself, is sufficient to support a finding that M.B.G.'s identification of Little as her assailant, both in the lineups and at trial, is constitutionally unreliable.

The suggestive identification procedure in this case is, of course, the use of hypnosis in an attempt to improve M.B.G.'s recall. As noted, this circuit has not determined whether, under the due process clause of the fourteenth amendment, hypnotically-enhanced testimony can be used by the prosecution in a criminal case or, if allowed, what procedural safeguards must be complied with.[21] And, we do not have to answer those questions to decide this case because the hypnosis of M.B.G. did not include *any* of the procedural safeguards required in jurisdictions which allow hypnotically-enhanced testimony. *See, e.g.* 432 A.2d at 89-90. Thus, even if we were to hold that such testimony was admissible, we would not allow it in this case because of the lack of procedural safeguards.

First and foremost among the problems with the hypnosis of M.B.G. is that no record was kept of either of the sessions. The importance of a record has been noted by many of the courts which have addressed the issue of hypnotically-enhanced identification testimony. *See, e.g., United States v. Adams*, 681 F.2d 193, 199 (9th Cir.1978). Without a record of the session, it is impossible for the court to determine whether any improper sug-

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21. It is obvious from *Sprynczynatzk*, 771 F.2d 1112, that this court rejects the approach that the fact that a witness has been hypnotized merely goes to the weight and not the admissibility of the testimony.

gestions occurred. Moreover, the lack of a record deprives the defendant of a means of attacking the credibility of a witness.[22]

Likewise, no record was kept of what information about the case was given to Officer Lincecum before hypnotizing M.B.G. And, Officer Lincecum did not obtain a detailed description from M.B.G. of her prehypnotic memory before hypnotizing her.

Furthermore, M.B.G. was not hypnotized by an "impartial licensed psychiatrist or psychologist trained in the use of hypnosis and thus aware of its possible effects on memory so as to aid in the prevention of improper suggestions and confabulations." *Sprynczynatyk*, 771 F.2d at 1123 n. 4. Rather, she was hypnotized by a police officer whose only training was a four day seminar on the subject. Also, other persons besides Officer Lincecum and M.B.G. were present during the first session without any explanation as to why their presence was necessary.

In short, every procedural safeguard required by *Hurd* and recommended by this circuit for civil cases in *Sprynczynatyk*, was violated.

Another factor considered important by many courts is corroboration of the posthypnotic testimony. *See Clay v. Vose*, 771 F.2d 1 (1st Cir.1985); *Sprynczynatyk*, 771 F.2d at 1123; *Harker v. Maryland*, 800 F.2d 437 (4th Cir. 1986).[23] Without corroborating evidence, it is extremely

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22. A video tape of the session would be the preferred method; however, under certain circumstances an audio or stenographic record might be acceptable.

23. *See also United States v. Valdez*, 722 F.2d 1196 (5th Cir.1984). In *Valdez*, the Fifth Circuit, while adopting a per se inadmissible approach under the particular facts stated, "[i]f adequate procedural safeguards have been followed, *corroborated* posthypnotic testimony might be admissible." *Id.* at 1203 (emphasis added).

difficult, if not impossible, to determine whether or not the posthypnotic recall is accurate. M.B.G.'s posthypnotic identification of Little was uncorroborated. She did not identify him in the photographic lineups until after her first hypnotic session. In addition, she was the only witness at trial who positively identified Little as her attacker.[24]

Courts require procedural safeguards and corroborative evidence both to minimize the chance of a subject suffering from the many problems associated with hypnosis and to allow an after the fact evaluation by an expert to determine if the subject is experiencing such problems. M.B.G. could very well be suffering from any or all of the above discussed problems associated with hypnosis. But, the state's failure to follow any procedural safeguards and the lack of corroborating evidence prevents any expert, much less this court, from determining whether she is indeed suffering from such problems, or even if the sessions were conducted in a fair manner. In light of this, her initial photographic identification of Little, which occurred after the first hypnosis session, is tainted. And, because neither the experts nor the courts can unravel M.B.G.'s intertwined prehypnotic and posthypnotic memories, her subsequent identifications of Little are also tainted to such an extent to be constitutionally unreliable. Thus, the state's use of her identification of Little at trial violated his fourteenth amendment right to due process of law.

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24. The problem of not having any corroborating evidence is exasperated in this case by Officer Lincecum's failure to make a detailed record of her prehypnotic memory prior to hypnotizing her.

V. CONCLUSION

Our inquiry does not end upon a finding that Little's right to due process was violated by the use of post-hypnotic identification testimony. We must still inquire whether this constitutional error amounts to prejudicial error.

The United States Supreme Court has held that a constitutional violation results in prejudicial error "unless it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). We have no doubt that the error in this case was not harmless. M.B.G.'s identification testimony was crucial to Little's conviction. Her testimony was the only positive testimony which placed Little at the crime scene. Joe Mosby, the apartment maintenance man, could only tentatively identify Little at trial as the black man he saw around M.B.G.'s apartment on the day of the rape and his tentative identification was also subsequent to being hypnotized by the police. Moreover, there was little physical evidence to corroborate M.B.G.'s identification. An expert testified that a pubic hair found in the victim's panties possessed similar characteristics to that of Little. The expert, however, was unable to determine the race, sex, or bodily origin of the hair. Fingerprints found on the window ledge where the rapist exited the apartment do not match Little's fingerprints. Furthermore, M.B.G.'s initial description of her assailant does not fit Little.

Our decision does not make M.B.G. incompetent as a witness. She may still testify from her prehypnotic memory of the events of the attack as long as it is uncontaminated by the hypnosis. *Sprynczynatyk*, 771 F.2d

at 1123; *Valdez*, 722 F.2d at 1204. Thus, she may testify as to "those matters which [s]he was able to recall and relate prior to hypnosis." *Valdez*, 722 F.2d at 1204. To assure that the testimony is in fact her uncontaminated prehypnotic memory it either must have been preserved in written, audio tape or video tape form or be corroborated by some other independent basis. *Valdez*, 722 F.2d at 1204.

We grant petitioner-appellant Little's Petition for a Writ of Habeas Corpus. The state shall have 120 days from this order to either commence a new trial or release Petitioner from custody.

(Filed January 7, 1986)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF MISSOURI
SOUTHEASTERN DIVISION

No. S 85-266 C (D)

LEATRICE LITTLE,
Plaintiff,

vs.

BILL ARMENTROUT,
Defendant.

MEMORANDUM AND ORDER

This matter is before the Court upon plaintiff's petition for a writ of habeas corpus.

Plaintiff is presently confined in the Missouri State Penitentiary in Jefferson City serving twenty five (25) years for burglary and rape. Plaintiff's sole contention is that the identification procedures used to obtain his arrest and subsequent conviction by jury were improper. Plaintiff asserts that the victim and another witness were influenced by hypnosis and their subsequent identification of plaintiff is, thus, somehow tainted by suggestion. Plaintiff further asserts that the trial judge erred in not giving the jury plaintiff's proposed instruction on identification.

Plaintiff appealed his conviction to the Missouri Court of Appeals which in turn transferred the appeal to the Missouri Supreme Court due to preceived conflicts with other court rulings. After a careful review of the record, the Court found absolutely no evidence of improper suggestion during hypnosis and further found plaintiff's proposed instruction to be argumentative and unsuitable to be given to the jury. Justice Blackman, writing for the Court, presented a detailed analysis of plaintiff's complaints and concluded that plaintiff's identification conformed to proper standards and that, therefore the jury could evaluate the victim's testimony regading the identity of her assailant. *State v. Little,* 674 S.W. 541 (Mo. 1984).

If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the District Court, the Judge shall make an order for its summary dismissal and cause the petitioner to be notified. 28 fol. § 2254 Rule 4. Here the Court finds that plaintiff's petition fails to establish grounds for granting plaintiff's request.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's petition for writ of habeas corpus be and is DENIED.

Dated this 7th day of January, 1986.

/s/ H. Kenneth Wangelin
H. Kenneth Wangelin
United States District Judge

STATE of Missouri,
Plaintiff-Respondent,

v.

Leatrice LITTLE,
Defendant-Appellant.

No. 65666.

Supreme Court of Missouri,
En Banc.

July 17, 1984.
Rehearing Denied Sept. 11, 1984.

* * *

BLACKMAR, Judge.

Defendant appeals his convictions of first degree burglary[1] and forcible rape[2] for which he received consecutive sentences of 5 and 20 years. The Missouri Court of Appeals reversed and remanded for a new trial, concluding that the state had failed to demonstrate that photographic and standing lineups received in evidence were not tainted by hypnotic procedures which the victim and another key witness had undergone. That court then transferred the case here because of possible conflict with *State v. Greer,* 609 S.W.2d 423 (Mo.App.1980). We consider all points as on original appeal, and now affirm.

According to the state's evidence, defendant raped M.B.G. in her basement apartment during the early eve-

1. Section 569.160, RSMo 1978.
2. Section 566.030.1, RSMo 1978.

ning hours of August 13, 1980, after entering through a window, hiding in her bedroom closet and awaiting her return from work.

Identification was the only substantial issue at trial. The victim identified the defendant in court and testified to her earlier identification in photographic and standing lineups. She stated that defendant wore one of her blouses over his head during the incident, but that for at least two seconds she did get a clear view of his right profile. Another witness, Joseph Mosby, had been working outside the apartment shortly before the rape incident. He tentatively identified the defendant in a lineup, but, after skillful cross-examination at trial, said that he was uncertain of his identification. A police officer hearing a radio report of the rape while patrolling in his car stated that he approached a man which he identified, as the defendant, and that the man fled when he stopped his patrol car. The defendant took the stand to deny the charges and produced several alibi witnesses who testified that he was present in Poplar Bluff, 78 miles away, at or about the time of the rape.

I.

Although the court of appeals thought that this case might be an appropriate vehicle for detailed exposition of the law relating to testimony aided by hypnosis, we do not find any basis for a conclusion that the identification testimony was tainted by improper suggestion.

The rape occurred August 13, 1980. The victim described her attacker to the investigating officers. Although she had only a brief glimpse of the right side of his face, she was positive in her identification, and her

testimony, absent a showing of improper suggestion, may be weighed by the jury. *State v. McGee*, 447 S.W.2d 270, 272 (Mo. banc 1969), *cert. denied*, 397 U.S. 1056, 90 S.Ct. 1400, 25 L.Ed.2d 672 (1970).

On August 15, 1980 the victim underwent a hypnotic interview conducted by Officer B.J. Lincecum of the Cape Girardeau Police Department. Her sister went along to witness the session but did not speak during the interview. The session lasted several hours. A voice tape was made but unfortunately was destroyed after 15 days in accordance with departmental policy. There is absolutely no indication that any kind of suggestion was made to the victim during the interview. The victim, her sister, and Officer Lincecum all testified emphatically that there was no such suggestion. The police had no suspect at the time. The victim said that she saw the incident again during the session, but added nothing to her prior description.

The victim viewed photographic displays on October 16, November 5 and November 10 of 1980. The defendant's picture was not included in any of these lineups. She pointed to a picture in the October 16th lineup which she said resembled the assailant more than did the other pictures, but said that the picture was not that of the rapist. On December 23, 1980, she was shown a photographic display containing the defendant's picture and she picked him out. Sometime between December 25 and 31, 1980, M.B.G. was shown two more photographs, one of the defendant alone and the other showing him prominently in a group shot. She identified him in both pictures. On January 26, 1981, she viewed a standing lineup of four individuals. She immediately

eliminated two but wanted to check the other two further, asking that each display a right profile. She then identified the defendant as the person who raped her. At trial, she again made a positive identification of the defendant.

Mosby submitted to a hypnotic interview on September 5, 1980, also conducted by Officer Lincecum. His roommate went along as a witness but did not testify. These tapes were also destroyed pursuant to departmental policy. Both Lincecum and Mosby testified that no suggestion was made during the interview. The police had not identified any suspect by this time. Mosby had described the person he saw outside the apartment building as a "Mulatto." This description was not augmented as a result of the hypnotic session.

On February 9, 1981, Mosby picked the defendant out of a photo lineup but said that he was not "100% sure" of his identification. He made a tentative identification in a standing lineup on April 4, 1981, but again said that he was not 100% sure. His initial identification at trial was likewise tentative and, following cross-examination, he said that he could not identify the defendant in the courtroom as the person he had seen outside the apartment building.

The defendant protests vehemently about the destruction of the tapes of the hypnotic interviews. The tapes were erased for reuse, pursuant to departmental practice, after 15 days. There is no indication of deliberate purpose of concealment of the subject matter of the interview. So far as the evidence shows, the police had no suspect and no leads at the time of the erasure. If the department is to make use of hypnotic procedures, with the surrounding aura of mystery perceived by the public, it would be

better for all and would induce greater confidence in the system of justice if the tapes are preserved. (We are told that the department has now changed its policy). No rule of law, however, provides for automatic sanction simply because of the destruction of data which might assist in the evaluation of evidence, when there is no intimation of ulterior motive.[3] The facts surrounding the hypnotic interview may be established by such competent evidence as may be available, including the testimony of the subject, the hypnotist, and other witnesses. The jury may weigh the testimony and then give such weight as it thinks appropriate to the destruction of the tapes.

We recognize the duty of the court to examine into claims of taint in the evidence.[4] This is especially important when assertions of undue suggestiveness are made. *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). The uncontradicted evidence shows, however, that no suggestion whatever was implanted at the time of the hypnotic interviews, or that the police had anything to suggest. The defendant was not shown to be a police character. Officer Lincecum was not otherwise involved in the investigation of the case, and was not familiar with details of the offense. Neither witness made an identifi-

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3. The United States Supreme Court recently held that the constitutional duty of the states to preserve evidence is limited to evidence that might be expected to play a role in the suspect's defense. The evidence must possess an exculpatory value that was apparent before it was destroyed, and must also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *See California v. Trombetta*, ... U.S. ....., 104 S.Ct. 2528, 80 L.Ed.2d ..... (1984), in which the Court held that the fourteenth amendment's due process clause does not require state law enforcement agencies to preserve, for defense use at trial, breath samples of suspects tested on a breath-alcohol level analysis instrument.

4. *State v. Boothe*, 485 S.W.2d 11 (Mo. banc 1972); *State v. Walters*, 457 S.W.2d 817 (Mo. 1970); *State v. Harris*, 571 S.W. 2d 443 (Mo.App. 1978).

cation, firm or tentative, until many months after the hypnotic interview. Neither interview yielded additional information. The question of taint by suggestiveness is a preliminary question of fact addressed to the court. The defendant has the burden of adducing facts which indicate some sort of taint, in order to present the question of suggestiveness for decision. No such demonstration has been made in this case. There is no occasion for overturning the trial court's ruling.

The defendant protests because of the hypnotist's assertedly inadequate qualifications. He had no academic background. His training had consisted of four days of eight hours of instruction. He was cautioned to use hypnotic techniques only in interviews and not to attempt psychological experiments such as trying to help people stop smoking. There is no reason to inquire, in this case, as to whether the training shown by the record was adequate to make Lincecum an expert hypnotist, because the record is devoid of information as to how his ineptitude, if inept he be, contributed to an improperly suggestive session.

The defendant complains that the funds of the public defender's office were not adequate to permit suitable investigation of the possibility of inappropriately suggestive influences. There is nothing to show that any deeper inquiry would have been fruitful. There is a state university in Cape Girardeau with a faculty of Psychology and library facilities, and we are confident that a resourceful lawyer would not be helpless in obtaining expert information sufficient for a preliminary inquiry, at little or no expense.

There is, furthermore, no indication that the witnesses reacted in a way indicative of improper suggestion. The

victim gave negative answers when presented with three successive photo lineups before picking the defendant out of the fourth one. Mosby never came up with a positive identification.

State v. Greer, supra, discussed the responsibility of the court to determine that identification procedures were not unduly suggestive, in a case in which it appeared that "the police had come up with more information than they had prior to the session." Judge Manford engaged in a thorough and impressive analysis, on matters which were necessary to the decision in that case. His opinion is highly persuasive. We do not reach the points he covered, because of the total absence of any indication that the hypnotic procedures employed in this case had any effect whatsoever, and here is no occasion for us to comment further or to consider the cases which have been decided in other jurisdictions since *Greer.*[5] The record

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5. The Court of Appeals discussed the following cases that have been decided since the decision in *State v. Greer,* 609 S.W.2d 423 (Mo.App.1980):

1. Latest case holding that pretrial hypnosis does not render resulting identification and testimony inadmissible.

State v. Brown, 337 N.W.2d 138 (N.D.1983).

2. Party attempting to use hypnotically affected testimony should have burden of demonstrating that hypnotic session was not affected by impermissible suggestiveness.

Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983).

People v. Hughes, 59 N.Y.2d 523, 466 N.Y.S.2d 255, 453 N.E.2d 484 (1983).

State v. Beachum, 97 N.M. 682, 643 P.2d 246 (Ct.App. 1981).

State v. Armstrong, 110 Wis.2d 555, 329 N.W.2d 386 (1983), *cert. denied,* ..... U.S. ....., 103 S.Ct. 2125, 77 L.Ed.2d 1304 (1983).

(Continued on following page)

before us demonstrates adequately that the trial court did not err in refusing to suppress the lineup and trial identifications.

II.

The defendant also argues that the pretrial identification lineups at which he was identified were unduly suggestive, apart from the hypnosis. The point is not persuasive. The first identification was in a photographic display on December 23, 1980. The trial judge determined that the photographs presented a proper display, with no indication of improper suggestion. The first display at which identification was made came four months after the victim had submitted to the hypnotic interview. The

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Footnote continued—

Contra State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981) holds that burden is on the defendant to show suggestiveness.

a. Where hypnotic session is found to be suggestive the state must demonstrate that the in-court identification has a factual basis independent of the hypnotic session.

Peterson v. State, 448 N.E.2d 673 (Ind.1983).

Strong v. State, 435 N.E.2d 969 (Ind.1982).

3. The *Frye* Test (*Frye v. United States*, 293 F. 1013 (D.C. Cir.1923)) governs the admissibility of scientific evidence.

State ex rel. Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (Ariz. banc 1982).

People v. Shirley, 31 Cal.3d 18, 181 Cal.Rptr. 243, 641 P.2d 775 (Cal. banc 1982), *cert. denied*, 458 U.S. 1125, 103 S.Ct. 13, 73 L.Ed.2d 1400 (1982).

Collins v. State, 52 Md.App. 186, 447 A.2d 1272 (1982).

Polk v. State, 48 Md.App. 382, 427 A.2d 1041 (1981).

4. Situations where the witness was unable to identify the incident or culprit prior to hypnosis.

State v. LaMountain, 125 Ariz. 547, 611 P.2d 551 (Ariz. banc 1980).

People v. Gonzales, 108 Mich.App. 145, 310 N.W.2d 306 (1981).

defendant fails to convince us that the trial judge erred in allowing testimony about the lineups.

Sometime between December 25 and 31, 1980, following the lineup identification, the victim viewed two pictures of the defendant, one of which showed him alone while the other showed him as the most prominent individual in a group. The effect of this display was not shown to be more than minimal. The showing of a single picture of a suspect is not necessarily prejudicial, and does not inherently taint an in-court identification. *State v. Kirksey*, 647 S.W.2d 799 (Mo. banc 1983). We cannot say that the trial judge erred in admitting evidence of the photographs displayed to the victim. The record shows affirmatively that she was careful in her identification.

The defendant points to the difference in appearance of the several people shown in the photographic and standing lineups. Identical appearance is not required, and, indeed, is impossible. *State v. Kirk*, 636 S.W.2d 952 (Mo. 1982). There is no showing of an attempt to establish a lineup in which only the defendant would be picked out.

As for the lineups viewed by Mosby, both photographic and standing, the short answer is that he failed to make a positive identification of the defendant. Any claim of error pales before this circumstance.

III.

The defendant argues that the court fell into error in refusing his tendered identification instruction. The court well might have exercised its discretion by giving the instruction offered, but our cases do not require it. The identification of the defendant as the criminal actor is an essential part of the state's burden of establishing guilt

beyond reasonable doubt. The instruction is essentially argumentative and redundant. Our courts shy away from instructions of this kind. Thus, the defendant in a negligence case is not entitled to a "sole cause" instruction, because an occurrence which is solely caused by some other factor is not caused by the defendant's negligence, and the verdict director adequately tells the jury that it must find negligence. MAI 1.03. Here the facts would have justified the former practice of giving, at the prosecution's request, an instruction that the defendant's flight from the officer who confronted him shortly after the rape could be taken as evidence of consciousness of guilt, but MAI-CR2d 5.40 now states explicitly that no "flight or concealment" instruction is permitted to be given. MAI does not forbid the giving of an identification instruction, but the issue of identification is inherent in the state's verdict director and the trial court's refusal of the instruction is not ground for reversal. *State v. Higgins*, 592 S.W.2d 151, 161 (Mo. banc 1979).

The judgment is affirmed.

All concur.

(Filed January 3, 1984)

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION FOUR

No. 44628

STATE OF MISSOURI,
Plaintiff-Respondent,

vs.

LEATRICE LITTLE,
Defendant-Appellant.

Appeal from Circuit Court, Cape Girardeau, Missouri
Hon. A. J. Seier, Judge

OPINION FILED: January 3, 1984

Leatrice Little, hereinafter appellant, appeals his conviction of Burglary in the First Degree, § 569.160,[1] and Forcible Rape, § 566.030.1 and consecutive sentences of 5 years on the conviction for Burglary in the First Degree, § 558.011.1(2), and 20 years on the conviction for Forcible Rape, § 566.030.1, in the Circuit Court of Cape Girardeau County. We reverse and remand.

Because appellant does not contend the state did not make a submissible case a short statement of the evidence supporting the verdict of the jury will suffice; however, where necessary to relate evidentiary facts in analyzing disposition of other Points Relied On, it shall be done. According to the state's evidence appellant entered M.B.G.'s

1. All statutory references are to RSMo 1978.

apartment by removing a screen from a window to her apartment in Cape Girardeau, Missouri and forcibly raped her. M.B.G. identified the appellant at trial as the rapist. The jury accepted her identification of the appellant as the man who burglarized her apartment and raped her, and found him guilty of Burglary in the First Degree and Forcible Rape.

On appeal eight Points Relied On are presented as grounds for reversal of the trial court's judgment and remand for a new trial. The first of these is directed at the refusal of the trial judge to give appellant's requested non-MAI-CR identification instruction. This Point Relied On fails to state "wherein and why" the failure to give the instruction deprived the appellant of a fair trial and preserves nothing for review by this court. Rule 84.04(d). It is the rule in Missouri, however, that whether to give a separate cautionary instruction on the issue of identity is a matter resting in the sound discretion of the trial court. State v. Higgins, 592 S.W.2d 151, 161 (Mo. banc 1979). Even though the identification of the appellant as the burglar-rapist was hotly contested throughout the trial we discern no abuse of discretion in the trial court's refusal to submit the tendered instruction.

The remaining Points Relied On are directed to alleged trial court error in (1) failing to sustain appellant's motion to suppress the in-court testimony of M.B.G. and her identification of appellant as the man who raped her because (a) the state did not establish that she had an opportunity to observe her assailant and her identification of appellant as the rapist was the result of impermissibly suggestive pre-trial identification procedures employed by the Cape Girardeau Police Department which gave rise to a substantial likelihood of mistaken identification; (b)

because her identification of appellant as the rapist was caused by improper suggestions tendered to her while undergoing hypnotic questioning and appellant was thereby deprived of his right to due process and effective cross-examination of the witness under the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 10 and 18, a and b of the Constitution of Missouri; (2) in failing to suppress the in-court testimony of Joe Mosby identifying appellant as the man seen near the door of M.B.G.'s apartment immediately prior to the time the crime was committed because his memory was so tainted by hypnotic questioning and suggestion that his identification of appellant was the result of such hypnotic influence so as to deny appellant his right to effective confrontation and cross-examination of the witness in violation of the Sixth and Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 18, a and b of the Missouri Constitution; (3) in failing to suppress the in-court identification of appellant by both of these witnesses because said identifications were tainted by questioning under hypnosis; and (4) the failure of the trial court to sustain appellant's Motions to Dismiss pursuant to Supreme Court Rule 25.16 because the tape recordings of the questioning of these witnesses while under hypnosis had been destroyed.

The crucial question for decision in this appeal is whether the testimony of these witnesses who had been subjected to hypnosis should have been barred. To decide this question we believe it necessary to relate in detail the evidence on the question of the appellant's identification as the rapist; this was the only real issue in the case and was the hotly contested factual question. The ap-

pellant did not challenge that M.B.G. was raped and her apartment burglarized. His defense was alibi.

The state's evidence was that at approximately 5:30 p.m. on August 13, 1980, M.B.G. arrived at her apartment in Cape Girardeau from work. Joe Mosby was trimming the grass in front of her bedroom window. She went to her basement apartment, unlocked the door, entered the apartment, closed the door and locked it behind her. She did not turn on any lights because it was still "broad daylight" and she had no trouble seeing. She went into her bedroom, pulled the curtains to the bedroom because Mr. Mosby was working outside her bedroom window. She turned the lights on in the bathroom and entered the bathroom. She then heard a scraping around her living room window. The curtains in the living room were open. After about 10 minutes she finished in the bathroom and entered the living room to look at the living room window. She shut the living room window and the telephone rang. By this time it was approximately 5:45 p.m. She spoke on the telephone for 20 or 30 minutes with a girl friend and after hanging up the telephone, she went into the kitchen and turned the lights on. She intended to fix some supper and started to heat some water; however, she changed her mind because it was her night to go to the Health Spa and she was running short of time. She returned to the bathroom, tied back her hair and started towards her walk-in closet to get a change of clothes. She pushed the door of the walk-in closet open and as she did a body was "coming up to me." This person had her black and red checked shirt on his body and her blue and white shirt around his head.

She ran toward her front door, but before she got there she was grabbed around her chest from behind;

at that time she observed the hands of the person grabbing her and they were black. She pleaded: "Please don't hurt me. What do you want? Please don't hurt me." The person replied: "You, I want you; shut-up and I won't hurt you." She had screamed when first grabbed from behind and then turned around and attempted to fight.

The person ripped her hosiery off and at this time she saw a maroon belt dangling down in front of her. She thought he would strangle her, or tie her up, or hurt her. He started dragging her towards the bedroom and she fought to avoid being dragged into the bedroom; she grabbed ahold of things, including the telephone which she intended to hit him with, but he knocked it out of her hands. Once he got her into the bedroom she escaped from his grasp and ran to the front door but before she could get it unlocked, he grabbed her again, and put the chain on the door. As they were struggling at the front door the shirt came away from the man's face and she "got a good hard look at the side of his face"; it was "black, clean shaven, smooth, cheekbone high, round, his jaw was rounded, his chin, his lips, his nose." She could not see his ear, nor his hairline. She observed his face for from 2 seconds to a minute, and then looked away because she didn't want him to see her looking at his face for fear he would kill her or really hurt her if he knew she saw him.

He started pulling her towards the bedroom again, knocked her off her feet and her head hit the floor. Finally he pulled her into the bedroom, but she escaped again and once again made it to the front door; when he again caught up with her, pushed her over an over-

stuffed chair near the door. She hit her head on a table and fell down into the seat of the chair with her head against the arm of the chair, face-up. He fell on top of her and raped her.

While this was taking place someone knocked at the door and a woman's voice inquired if she was alright. She replied "help me, help me," and managed to raise up and unlock the door. The woman - Police Officer Susan Boudinot - attempted to push the door open, but the assailant pushed it shut. M.B.G. finally opened the door and escaped from the apartment with the assistance of Officer Boudinot. The rapist left the apartment and made good his escape.

At trial the victim identified appellant as the man who raped her. This identification was based upon a right profile view of his face during a period of not less than 2 seconds nor more than one minute while at the front door when the blouse he had over his head fell away. She, at that time, saw "his cheekbone, his jaw, his chin, his lips, his nose, his eye."

Mr. Mosby, at trial, also identified appellant as the man he observed at the door to the apartment occupied by M.B.G. shortly before the rape took place. His identification was "tentative." On cross-examination he was asked, "Isn't it true as to the bottom line of your testimony, that you're not sure that Leon Little is the man that you saw standing in front of 611 Pearl?" His response was "I am not sure."

Prior to trial appellant filed a number of pre-trial motions, none of which are incorporated in the legal file. To ascertain the nature of these motions we have had to search the transcript of the evidentiary hearings on said

motions. One, referred to by the judge presiding over the hearing,[2] as a "Motion to Suppress Lineup, Photo Display, Photo Throw Down, Voice Identification and Pre-Trial Courtroom Identification of Defendant," sought a court order preventing the victim and Mr. Mosby from testifying about pre-trial photo displays and lineups on the grounds that the procedures employed by the Cape Girardeau Police Department were so suggestive that the identification of appellant as the rapist was the product of these improper procedures. This motion was taken up on March 25, 1980, and denied.

During a pre-trial conference on April 21, 1981, the appellant moved orally to suppress the in-court identification of Mr. Mosby. Evidence was heard, and the motion was denied. Again on April 24, 1981, appellant orally moved to suppress the in-court identification of the victim. Evidence was adduced and the motion was denied. On April 27, 1981, the day the trial commenced, appellant again moved orally to suppress the identification testimony of the victim and Mr. Mosby, but once again the motions were denied.

However, appellant's counsel failed to object to the in-court identification by Mr. Mosby of the appellant as the black male he observed at the door of M.B.G.'s apartment shortly prior to the rape. It is the well established rule in this state that even though the issue of impermissible identification was presented in a motion to suppress, the failure of appellant to object to the in-court identification results in the issue of identification not being preserved for appellate review, and this rule is to be strictly applied. State v. McCrary, 652 S.W.2d 220, 222

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2. This judge was not the same judge who presided at trial.

[1] (Mo.App. 1983); State v. Fields, 636 S.W.2d 76, 79 [1] (Mo.App. 1982). The failure of appellant's counsel to object at trial to Mr. Mosby's identification testimony triggers this rule and we hold that this Point with respect to his in-court identification testimony was not preserved for review.

Appellant did however object to M.B.G.'s in-court identification testimony and preserved this Point in his motion for new trial.

One of appellant's arguments in support of his contention that the procedures employed by the Cape Girardeau Police Department were so suggestive as to lead to mistaken identification is directed to the use of photographic displays during the course of the investigation to solve the crime. Another impermissibly suggestive procedure he alleges brought about a mistaken identification is the makeup of the lineups shown to the victim and Mr. Mosby.

The various photographs employed in the numerous photographic displays and the photos of the corporeal lineups employed by the Cape Girardeau Police Department in its effort to obtain identification of the rapist, although introduced into evidence at the hearings on the motions to suppress and during the course of the trial, have not been filed with this court. The testimony of the various witnesses does not lead us to conclude that these photographs nor the lineups were so suggestive as to produce a mistaken identification. Nor is there any evidence to support a finding that any suggestions made by the police during these photographic displays and the lineups led to appellant's identification as the rapist.

We are concerned however with the use of hypnosis by the Cape Girardeau Police Department and what effect, if any, it may have had on the subsequent identification of appellant as the rapist.

Prior to trial appellant was made aware of the fact that the victim and Mr. Mosby had been subjected to hypnosis. He filed pre-trial motions for appointment of a psychiatrist or psychologist versed in hypnosis to testify on behalf of the appellant on the "suggestibility which relates to the total problem (of hypnosis) today," and for an order that the state, not the Public Defenders Office, pay for the services of the expert. Evidence was adduced concerning the dire financial status of the Public Defenders Office at that time in support of the motion. This motion too was denied.

Appellant had also filed a Motion to Compel Discovery seeking a tape recording of the hypnotic session of M.B.G. This motion had been filed on March 10, 1981, and was argued and overruled on March 25, 1981. By the time the motion was filed the tapes of the hypnotic session had already been erased in accordance with the provisions of General Order 39 of the Cape Girardeau Police Department Procedures Manual, which authorized the erasure of tapes 15 days after they were made.[3] Appellant also filed Motions to Dismiss the cause of action pursuant to Rule 25.16 V.A.M.R. because the state failed to produce the tapes of these hypnotic interviews. All of these motions were overruled.

As a consequence the record contains little evidence on the hypnosis question. However, from the evidence

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3. These tapes were not video-tapes - they were voice tapes made on a "four channel recorder."

adduced at the hearing on the Motion to Suppress we discern that the person conducting the hypnosis was a "full-time polygraphist and and hypno-technician" for the Cape Girardeau Police Department. He had a high school education, joined the Air Force in 1950, and served in that branch of the military services until he retired in 1974. In 1966 he attended the Senior NCO Academy taking courses in "Human Relations and Psychology." He joined the Cape Girardeau Police Department in December, 1974. After graduating first in a class of 17 in a basic course for new policemen he was assigned to the Patrol Division and, in September, 1975, entered a program which trained him in detective work. He then joined the Detective Division and was assigned to investigate felony cases. In September or October, 1976, he attended the National Training Center of Polygraph Science. After a year's internship he was certified as an expert polygraphist and was accepted into the Academy of Certified Polygraphists that same year. He was a member of this Academy at the time he testified. He is also a member of the American Association of Police Polygraphists and the Missouri Polygraphist's Association. The record demonstrates that this evidence was developed to prove the witness' experience in interviewing suspects "or in interviewing in general."

Insofar as his expertise in hypnosis is concerned, he attended the Investigative Hypnosis School conducted by the Law Enforcement Hypnosis Institute Incorporated, a Los Angeles group, in September, 1979. This school teaches the theory of hypnosis and gives those in attendance an opportunity to hypnotize and be hypnotized on a one on one basis but under supervision of the instructors. This course was conducted in Indianapolis,

Indiana, over a 4 day period. Those in attendance spent 8½ hours to 9 hours per day in lectures and the taking of notes from the instructors, and the last two hours of the day were given over to "practical hypnosis" when they would break up in groups of three. One would be the hypnotist, one the person to be hypnotized, and the third the observer. He participated three of the four days in about 9 such sessions.

The Director of the Law Enforcement Hypnosis Institute, Incorporated, is Dr. Martin Riser.[4] Among the instructors at the Indianapolis school were Jerry Cohen, a former senior trial lawyer for the Los Angeles County District Attorney's Office and Captain Michael Neilson, Commanding Officer of the Bunko and Forgery Division of the Los Angeles Police Department. These gentlemen are consultant and project director, respectively, for the Investigator Hypnosis Research Program, at the Los Angeles Police Department.

In October, 1979, this witness became a member of the Society for Investigative and Forensic Hypnosis. He has lectured on hypnosis to the Criminal Justice class at Southeast Missouri University in 1980 and 1981, the Legal Secretaries Association of Southeast Missouri, the Dental Assistants Association of Southeast Missouri, and the Optimists Club of Cape Girardeau.

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4. Dr. Riser is the Director of Behavioral Science Services of the Los Angeles Police Department. The Law Enforcement Hypnosis Institute is a proprietary school in Los Angeles that teaches courses in hypnotism to police and other law enforcement personnel. He has testified in a number of criminal trials when the question of hypnosis has been before the court, and his testimony has been as a proponent of hypnotically aided recall. State v. Shirley, 641 P.2d 775, 798 (Cal. 1982).

M.B.G. was the 27th person he had hypnotized. As of the date of his testimony, March 25, 1981, he had conducted 63 hypnotic sessions.

Appellant challenged the expertise of this witness to testify concerning the theory or psychology of hypnosis but his objection was overruled because the trial judge was of the opinion that it "went to the weight of the evidence rather than its admissibility." The witness proceeded to expound on his understanding of hypnosis gained from the 4 day seminar, books he had read, and his experience as a hypnotist. He admitted that the hypnotist had to be suggestive to induce the hypnotic state. On cross-examination he testified that a person in hypnosis is quite suggestible and that in hypnosis suggestibility is heightened. He admitted that in his training in hypnosis he was advised to maintain a permanent record of the hypnotic interview and for this reason the sessions with M.B.G. and Mr. Mosby were taped. Since the question of the destruction of the tapes in this case had come up, the Cape Girardeau Police Department had changed its rule relative to erasure of tapes of hypnotic sessions.

Appellant contends that the identification of himself by M.B.G. and Mr. Mosby was the result of improper suggestions made to these witnesses while undergoing hypnotic questioning.

The crime occurred on August 15, 1980. The victim and her attacker struggled in the apartment between 25 to 45 minutes. The lighting in the apartment was daylight. Although her attacker had one of her blouses over his head so that she could not see his face, at one time during the scuffling the blouse came loose from his head and she got a good look at the right side of his face for a period

of time she described as at least "two seconds, no longer than a minute." During this brief time she and her attacker were about 6 inches apart.

M.B.G. testified that immediately after the rape, while she was in Ms. Miner's apartment she described her assailant as a young, broad-shouldered black, slender body, 145 pounds, 5 feet 7 inches tall. M.B.G. spent the night with her sister and during that period told her sister that she had seen the right side of her attacker's face when the blouse fell away from his head.

M.B.G. testified on cross-examination on the hearing to suppress identification testimony that the purpose of the hypnotic interview was to run through the rape scene to see if she had forgotten anything and also to calm her down.

In addition to the hypnotist, and M.B.G., the sister of M.B.G. was present throughout the hypnotic session, and Mildred J. Gerecke, a special officer on the Cape Girardeau Police Department for the investigation of rape cases was in and out of the room while the session was conducted. Each of these persons testified that the hypnotist never suggested a description of the rapist throughout the session. M.B.G. testified that the hypnosis did not enhance her ability to identify her assailant.

The question for decision with respect to hypnosis is whether M.B.G.'s testimony concerning the identification of appellant as the rapist was caused by improper suggestions made to her while she was under hypnosis.[5]

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5. The question whether hypnotically aided testimony lacks sufficient reliability to make presentation of that evidence appropriate is not identical with the consideration which must be

(Continued on following page)

The state argues that even were we to assume that the pre-trial procedures were suggestive, there was a sufficient independent basis for the testimony and in-court identification of appellant by M.B.G.

The general rule is that when an appellant contends that the trial court erred in overruling a motion to suppress identification testimony because of allegedly suggestive pre-trial procedures, he has the burden of showing unfairness as a matter of law. State v. Ward, 518 S.W.2d 686, 688 [2] (Mo.App. 1975). This rule of law has been applied in cases where the question of suggestiveness arises in the context of photo array lineups, one-on-one confrontations, courtroom confrontations and other physical displays of a suspect or an accused. Where the question is one of in-court or out-of court identification following hypnosis however, some courts hold that the party attempting to use hypnotically affected testimony should have the burden of demonstrating that the hypnotic session was not affected by impermissible suggestiveness so as to render the subsequent testimony admissible. State v. Armstrong, 110 Wisc.2d 555, 329 N.W.2d 386, 394 [3] (1983). The Supreme Court of Indiana holds that where it is found that the hypnotic session was impermissibly suggestive the state must demonstrate through clear and convincing evidence that the in-court identification of the defendant has a factual basis independent of the hypnotic session. Peterson v. State, 448 N.E.2d 673, 675 (1983); Strong v. State, 435 N.E.2d 969, 970 (1982). The reason for applying a higher degree of proof where hypnosis is

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Footnote continued—

applied when passing on the suggestiveness of a pre-trial identification procedure and whether the in-court identification and testimony of a witness is permissible. Commonwealth v. Juvenile, 412 N.E.2d 339, 343 (Mass. 1980).

involved has been said to be ". . . , because of the great susceptibility a hypnotized subject has to suggestions made by the hypnotist." State v. Armstrong, supra, 329 N.W.2d l.c. 394.

Other cases holding that the burden is on the state to show the reliability of the witness who has been hypnotized are Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190, 1195 [2] (1983); State v. Beachum, 97 N.M. 682, 642 P.2d 246, 254 [4] (1982), (party seeking to introduce hypnotically refreshed testimony must establish compliance with the requirements for admissibility by clear and convincing evidence); People v. Hughes, 59 N.Y.2d 523, 466 N.Y.S.2d 255, 268 [4] (1983), ("Because of the unique and sometimes unfathomable consequences of hypnosis, the People should assume the burden of demonstrating by clear and convincing proof that the testimony of the witness as to his or her pre-hypnotic recollection will be reliable and that there has been no substantial impairment of the defendant's right of cross-examination"). However, State v. Hurd, 86 N.J. 525, 538, 432 A.2d 86, 97-98 (1981), while placing on the state the burden of showing by clear and convincing evidence lack of impermissible suggestiveness, opined that the normal assignment of burden on the defendant to show suggestiveness amounting to a constitutional violation should continue to be the rule.

We believe that where hypnosis has been employed to enhance the memory recall of a witness in a criminal proceeding the state must bear the burden to demonstrate by clear and convincing evidence that the hypnotic session was not impermissibly suggestive; and if said session is found to have been impermissibly suggestive, the state must also, by clear and convincing evidence, prove that the in-court identification of the defendant has a factual

basis independent of the hypnotic session before the witness may testify to an in-court identification of the defendant. We reach this conclusion because of the widely held opinion of experts in the field that hypnosis is not an acceptable scientific procedure for memory recall and the truthfulness elicited from the use of hypnosis for that purpose. State v. Beachum, supra.

Convictions based upon identifications are to be set aside only if the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. State v. Johnson, 634 S.W.2d 492, 493 (Mo.App. 1982); State v. Patterson, 598 S.W.2d 483, 488 [5] (Mo.App. 1980).

In resolving this issue we must initially consider whether the investigative procedures employed by the police were impermissibly suggestive. If we find this to be so we must then consider whether these procedures were so impermissibly suggestive as to create a very substantial likelihood of misidentification at trial. Whether this danger exists in a particular case depends upon the totality of the surrounding circumstances. State v. Higgins, 592 S.W.2d l.c. 159 [11].

Even if these procedures were impermissibly suggestive, in-court identification testimony may nevertheless be admissible if it is reliable. In determining whether the identification is reliable the factors set out in Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401, 411 (1972) must be applied. Those factors are (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the

witness at the confrontation; and (5) the length of time between the crime and the confrontation.

Against these factors is to be weighed the corrupting effect of the identification itself. Manson v. Braithwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140, 154 (1977).

The effect of hypnosis on the admissibility of both out-of-court and in-court identification was presented for the first time in this state to the Western District of this court in State v. Greer, 609 S.W.2d 423 (1980). The question on appeal was whether the trial court erred in admitting both the out-of court and in-court identification of appellant because the identification was the result of impermissible suggestion by hypnosis, and apart from any suggestiveness, identification premised upon hypnosis is inherently unreliable and violates appellant's rights to constitutional due process. These are the same issues presented in this appeal.

The hypnotist in the Greer case, a Dr. Saper, was a psychologist with training in the use of hypnosis, and had used hypnosis periodically in his therapy work and in police cases in his capacity as a reserve police officer. The hypnosis sessions were attended by two police officers, but neither participated in the session other than to observe. The hypnosis was done "to improve the victims' recollection." Neither the prosecution nor the defendant presented any evidence concerning the acceptance of hypnosis in the scientific community nor its reliability as a memory recall procedure; nor do we glean from the opinion that the qualifications of the hypnotist were in question.

In reaching its decision that the trial court did not err in admitting the challenged evidence, the court con-

sidered the evidence adduced on the hearing on the pre-trial motion to suppress evidence and the evidence developed at trial. The two victims of the kidnapping, rape and sodomy gave a police detective a description of the appellant shortly after the occurrence while in the hospital. This description was: "Negro male about 30 years old, five foot six, 150 pounds, stocky build, wearing a black hat, armed with an unknown type handgun, silver color, reported to have a mustache, medium length afro hairdo, and wearing a white coat." While undergoing hypnosis, 3 days later, both victims gave a description of their abductor as "around 30, heavy build, but wasn't fat . . . . something very strange about his eyes, almost Oriental or Egyptian . . . . he had very slight fingers and wore no jewelry . . . . he wore a black hat." The victims failed to identify anyone from two separate photo arrays, but 18 days after the hypnotic session did select a photo from an array of 13 photographs - 4 of which were of the appellant - and identified the appellant and two others as participants in the crimes. Approximately 37 days later the victims identified appellant while he and 7 other black males were in a courtroom on other charges having no connection with the crimes of which these two young women were victimized.

In deciding whether the hypnosis was impermissibly suggestive the court looked to other jurisdictions for guidance, and followed the "majority rule" holding that pre-trial hypnosis does not, as a matter of law, render resulting identification and testimony related thereto, inadmissible, and that the effect of hypnosis is a matter to be weighed by the trier of fact.

This may still be the "majority rule" but many of the cases relied on by the Western District, have since been overruled or modified.

People v. Hughes, supra, relied on by the Western District for the principle that the fact of hypnosis goes only to affect the weight of the evidence, was subsequently overruled by the Supreme Court, Appellate Division, Fourth Department, in People v. Hughes, 88 AD.2d 17, 452 N.Y.S.2d 929 (1982). In doing so, the Appellate Division decided, that the use of hypnosis had not gained general acceptance in the scientific community as a reliable method of restoring a witness' recollection of an event and therefore the testimony of a witness concerning hypnotically produced recall was, as a matter of law, inadmissible in a criminal case; however, the fact that the witness had undergone hypnosis did not make said witness incompetent as a witness or render inadmissible testimony of the witness of facts which she was able to recall prior to the hypnotic procedure.

An appeal was granted from this decision to the Court of Appeals, which affirmed the Appellate Division's decision that the trial court should not have permitted the victim to testify to events recalled after the hypnotic sessions. However, on the retrial of the case, the court also ordered the trial court to inquire into and resolve, prior to trial, (1) the extent of the witness' pre-hypnotic recollection and (2) whether the hypnosis was so impermissibly suggestive as to require exclusion of in-court testimony with respect to such pre-hypnotic recollection. People v. Hughes, 59 N.Y.2d 523, 466 N.Y.S.2d 255, 267 (1983).

Harding v. State, 5 Md.App. 230, 246 A.2d 302 (1969) cert. den. 395 U.S. 949, 89 S.Ct. 2030, 23 L.Ed.2d 468 (1969) also relied upon by the Western District in Greer, id., is no longer the law in that jurisdiction. Collins v. State, 52 Md.App. 186, 447 A.2d 1272, 1283 [6] (1982); Polk v.

State, 48 Md.App. 382, 427 A.2d 1041 [1] (1981). The Court of Special Appeals of Maryland, applying the Frye test[6] - Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) - held that the use of hypnosis to restore or refresh the memory of a witness is not accepted as reliable by the relevant scientific community and that such testimony is therefore inadmissible and overruled those previous cases admitting hypnotically induced testimony. It was also noted that the court in reaching its decision in Harding never reached the issue of different scientific viewpoints, or of general scientific acceptance of the use of hypnosis.

Other authorities relied upon in Greer - State v. Jorgensen, 8 Or.App. 1, 492 P.2d 312 (1971); Clark v. State, 379 So.2d 372 (Fla.App. 1979) and State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978) based their holdings on Harding and their precedential value is therefore suspect.

The following authorities cited in Greer for the proposition that the testimony of a witness who has experienced hypnosis is admissible include People v. Smrekar, 68 Ill.App. 3d 379, 24 Ill. Dec. 707, 385 N.E.2d 848 (1979); United States v. Adams, 581 F.2d 193 (C.A. 9, 1978), cert.den. 439 U.S. 1006,.99 S.Ct. 621, 58 L.Ed.2d 683 (1978); United States v. Awkward, 597 F.2d 667 (C.A. 9, 1979), cert.den. 444 U.S. 885, 100 S.Ct. 179, 62 L.Ed.2d 116, (1979); State v. Hurd, supra, and United States v. Narcisco, 446 F.Supp. 252 (E.D. Mich. 1977).

People v. Smrekar, supra, although holding that the fact of hypnosis goes only to the weight of the evidence,

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6. The Frye test governing the admissibility of scientific evidence is that scientific evidence will only be admitted at trial if the procedure and results are generally acceptable as reliable within the relevant scientific community.

specified that for such evidence to be admissible certain safeguards had to be shown. Those safeguards were (1) the hypnotist was shown to be competent; (2) the evidence revealed that no suggestion was employed during the hypnosis session; (3) other substantial evidence corroborated the identification; and (4) the witness had ample opportunity to view the assailant at the time of the occurrence.

The opinion of the New Jersey Supreme Court - a trial court - in State v. Hurd, supra, applied the Frye test for scientific evidence to hypnosis and declined to hold that hypnotically refreshed testimony is *per se inadmissible;* rather, it held that the potential for the production of fantasy and confabulation during a hypnotic exercise militates against *the automatic admissibility of hypnotically - induced recall* until an acceptable level of reliability of that recall is established, 414 A.2d l.c. 291.

The Hurd court established a two part test for admissibility of the hypnotically recalled evidence. First it adopted the procedural safeguards suggested by Dr. Martin Orne,[7] an expert witness for the defense,[8] and

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7. The procedural safeguards suggested by Dr. Orne are the following:

(I) The hypnotic session should be conducted by a licensed psychiatrist or psychologist trained in the use of hypnosis.

(II) The qualified professional conducting the hypnotic session should be independent of, and not responsible to the prosecutor, investigator, or the defense.

(III) Any information given to the hypnotist by law enforcement personnel prior to the hypnotic session must be in written form so that subsequently the extent of the information the subject received from the hypnotist may be determined.

(Continued on following page)

imposed on the state the burden of establishing by clear and convincing evidence that it had complied with these safeguards. Secondly, if the state satisfied this first step, then the state has the additional burden of showing by

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Footnote continued—

(IV) Before induction of hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them, carefully avoiding adding any new elements to the witness' description of the events.

(V) All contacts between the hypnotist and the subject should be recorded so that a permanent record is available for comparison and study to establish that the witness has not received information or suggestion which might later be reported as having been first described by the subject during hypnosis. Videotape should be employed if possible, but should not be mandatory.

(VI) Only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and post-hypnotic interview.

8. Dr. Martin T. Orne is a Doctor of Medicine, Professor of Psychiatry at the University of Pennsylvania, Director of the Unit for Experimental Psychiatry at the University of Pennsylvania Hospital and Senior Attending Psychiatrist at that hospital. He also holds a Ph.D. in Psychology. He is Past-President of the Society for Clinical and Experimental Hypnosis, Past-President of the International Society for Hypnosis, and has been Editor of the International Journal of Clinical and Experimental Hypnosis. He has served as reviewer of research proposals on hypnosis for the National Science Foundation, the National Institute of Mental Health, the Office of Scientific Research of the United States Air Force, and the Office of Naval Research. He has been consultant for a number of law enforcement agencies. He has been principal investigator of a major research group working on the nature of hypnosis and related phenomena since 1960. He has been a member of the editorial boards of various journals of psychiatry and psychology and has, himself, published over one hundred scientific articles. In addition, he has used hypnosis in clinical practice, has taught the subject and has carried out research on the nature of hypnosis. He wrote the article on hypnosis for the Encyclopedia Britannica and has served as a witness on the nature of hypnosis, its acceptance in the scientific community and its reliability.

State ex rel. Collins v. Supreme Court, 644 P.2d 1266, 1288, fn.6 (Ariz. Banc 1982).

clear and convincing evidence that there was no impermissibly suggestive or coercive conduct by the hypnotist and/or law enforcement personnel connected with the hypnotic exercise.

The court found that the experts who testified at trial indicated that in appropriate cases and where properly conducted, the use of hypnosis to refresh memory is comparable in reliability to ordinary recall. Nevertheless, the trial court, applying the Orne standards, found that the state had failed to satisfy these procedural safeguards. The court further found that the hypnotist and law enforcement personnel had exerted pressure on the victim to induce her to identify the defendant, both during and after the hypnotic session, and therefore granted defendant's motion to suppress the identification testimony.

The prosecutor's motion to appeal the trial court's Order was granted and on appeal the Supreme Court of New Jersey affirmed that part of the Order placing upon the party seeking to introduce the hypnotically refreshed testimony the burden to establish by clear and convincing evidence that the Orne safeguards had been observed. However, when the use of hypnosis results in a subsequent out-of-court or in-court identification of a defendant and the defendant challenges the admissibility of testimony concerning the identification, it disagreed with that part of the trial court's Order placing on the state the burden of establishing by clear and convincing evidence that "there was no impermissibly suggestive or coercive conduct by the hypnotist and law enforcement personnel connected with the hypnotic exercise."

Rather, the Supreme Court of New Jersey, held that where the use of hypnosis results in a subsequent out-

of-court or in-court identification and the defendant challenges the identification on constitutional grounds, i.e. that it is the result of pre-trial identification procedures and must be excluded because it is the product of pre-trial procedures which were so unnecessarily suggestive as to be conducive to irreparable mistaken identification; the defendant should still bear the burden of demonstrating by a preponderance of the evidence that the pre-trial identification - including the hypnosis - was so suggestive as to result in a substantial likelihood of misidentification. 432 A.2d l.c. 98 [13].[9]

The Supreme Court found, as did the trial court, that the state had failed to meet its burden of establishing the admissibility of the proffered identification by clear and convincing evidence, i.e. that hypnosis as performed in the case was a reasonably reliable means of yielding normally accurate recall, and affirmed the order of the trial court suppressing the victim's identification testimony.[10]

It can hardly be contended that Hurd stands for the proposition that the testimony of a witness who has undergone hypnosis is admissible per se, and that the fact of hypnosis goes only to the weight of the witness' tes-

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9. The court in this case did not reach the due process issue, i.e., whether the pre-trial procedure was so unnecessarily suggestive as to be conducive to irreparable mistaken identification. 432 A.2d l.c. 98.

10. The "Frye Test" the New Jersey Courts applied was "the result of scientific tests are admissible only when they have 'sufficient scientific' basis to produce uniform and reasonably reliable results and will contribute materially to the ascertainment of the truth." This is not the Frye Test announced in Frye v. United States, supra, requiring that the scientific test employed has gained general acceptance by the experts in the field, i.e. whether the reliability of hypnosis as a means of refreshing recollection has gained general acceptance by experts in the field.

timony. Rather, the New Jersey Supreme Court held that such testimony is not *per se inadmissible;* that hypnosis satisfied the New Jersey version of the Frye Rule; and the testimony of the witness who has been hypnotized is admissible if the state, by clear and convincing evidence, shows that the six safeguards enumerated at 432 A.2d l.c. 96-97, have been strictly observed. It further held that even when the state meets the burden of proof on the safeguards issue and the hypnosis results in a subsequent out-of-court or in-court identification of the defendant, the defendant may also challenge on constitutional grounds the admissibility of testimony concerning the identification on the grounds the procedures employed were so unnecessarily suggestive and conducive to irreparable mistaken identification as to amount to a violation of due process. When the constitutional grounds are raised, the defendant, as he ordinarily does in such cases, continues to bear the burden of demonstrating by a preponderance of the evidence that the pretrial identification procedures employed are so suggestive that they will result in irreparable mistaken identification.

United States v. Adams, supra, although it held that the fact of hypnosis affects credibility but not admissibility, recognized that investigatory use of hypnosis on persons who may later be called upon to testify in court carries a dangerous potential for abuse and stated that great care must be exercised to insure that statements after hypnosis are the products of the subjects' own recollections rather than of recall tainted by suggestions received while under hypnosis. The court acknowledged that previously it had considered only in civil actions the admissibility of such testimony, and then pointed out that other courts considering the problem in the context

of criminal trials had generally followed the same approach. The authorities cited for this latter proposition were Harding, supra, and, Jorgensen, supra.

In a footnote, 581 F.2d l.c. 199, the court said: "We think, at a minimum, complete stenographic records of interviews of hypnotized persons who later testify should be maintained. Only if the judge, jury, and the opponent know who was present, questions that were asked, and the witness's responses can the matter be dealt with effectively. An audio or video recording of the interview would be helpful."

The defendant in Adams failed to object to the adequacy of the foundation laid for the receipt of the testimony, but sought instead to exclude all in-court testimony of the witness who had undergone hypnosis on the grounds that the use of that testimony would deny him his Sixth Amendment right to confrontation and his right to call witnesses. Despite its disapproval of the hypnosis methods employed in the case, the Adams court stated that these constitutional arguments had been rejected in Kline v. Ford Motor Co., 523 F.2d 1067 (CA.9, 1975), and it could see no reason for a different result in a criminal case. Adams, supra, l.c. 199.

United States v. Awkward, supra, also relied upon by Greer, merely followed Adams, supra, and Kline, supra, both Ninth Circuit cases, and said that since the admissibility of hypnotically refreshed evidence in the federal courts of the Ninth Circuit was settled law, there was no need for a foundation concerning the nature and effects of hypnosis before said evidence was admitted. The opinion did, however, acknowledge that in those jurisdictions in which the admissibility of hypnotically re-

freshed evidence is still an open question, a foundation concerning the reliability of hypnosis is no doubt necessary, 597 F.2d l.c. 669.

At the time Greer was decided, November 3, 1980, it may well have been that the "majority view" was that pre-trial hypnosis did not, as a matter of law, render resulting identification and testimony inadmissible and that the effect of hypnosis was a matter of credibility to be weighed by the trier of fact. However, a substantial majority of courts that have dealt with the question in recent years have decided that the Frye Test applies in determining the admissibility of hypnotically aided testimony. Among these are: State ex rel. Collins v. Superior Court, 132 Ariz. 188, 199-202, 644 P.2d 1266 (1982); People v. Shirley, 31 Cal.3d 18, 181 Cal. Rptr. 243, 641 P.2d 775 (as modified, 1982); Polk v. State, supra; Commonwealth v. Kates, supra; State v. Mack, 292 N.W. 2d 764, 768 (Minn. 1980); People v. Hughes, supra; and Commonwealth v. Nazarovitch, supra.

Although Greer mentioned State v. Mack, 292 N.W.2d 764 (Minn. 1980) as a jurisdiction applying the Frye Rule to reach its decision that testimony of a previously hypnotized witness is inadmissible as a matter of law, it chose not to apply the Frye Test to hypnosis despite the fact the Frye Test had been applied in this state by the Supreme Court since at least 1945 in other cases where the admissibility of scientific procedures were in question.

The Supreme Court of Missouri in holding that the trial court did not err in refusing appellant's request that he be subjected to a lie detector test said that appellant's offer of proof did not show that method of detecting guilt had sufficient scientific support, and that the court

was not persuaded that it had. State v. Cole, 188 S.W.2d 43, 51 [12, 13] (Mo. 1945). The Frye case was cited in the opinion as one of four cases holding that "there was not sufficient scientific recognition of the efficacy of the machine to warrant the judicial acceptance of its recordings as evidence of the truth or falsity of the testimony of the subject witness; . . . ."

The same court in State v. Biddle, 599 S.W.2d 182, 185 [1] (Mo. banc 1980), citing Cole, id., as authority, said: "The results of polygraph examination are inadmissible as evidence in a criminal trial because they lack scientific support for their reliability."

The Frye Test had been applied by the Supreme Court of Missouri to neutron activation analysis of hair in 1971, to neutron activation analysis of blood in 1972; and by the Western District of this court to bitemark evidence in May, 1980.[11] The Greer court in its opinion did not analyze the reliability of hypnosis as a tool for the enhancement of recall nor the inherent dangers associated with the use of hypnosis enunciated in so many decisions; its decision was based upon the lack of support for appellant's contention that any impermissible suggestion occurred which would result in a "very substantial likelihood of irreparable misidentification."

The courts which have considered the effect of hypnosis on the admissibility of witnesses' testimony have reached varied results. One line of cases, as Greer recognized, holds that the testimony is admissible and the problem inherent in its use, i.e. its unreliability, goes only

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11. State v. Stevens, 467 S.W.2d 10, 22-24 (1971); State v. Stout, 478 S.W.2d 368, 372 (1972); and State v. Sager, 600 S.W.2d 541, 562 (Mo.App. 1980).

to the weight of the evidence. However, as we have pointed out hereinabove, some of those jurisdictions no longer accept that holding. Most of those who did were the progeny of Harding, supra.

An examination of the later opinions discloses a significant evolution in the approach of the courts to this issue. The Supreme Court of California pointed out in People v. Shirley, supra, 641 P.2d l.c. 785:

> In the earlier cases, as in Harding, the courts engaged in little or no analysis of the issue, and merely reiterated the general proposition that the fact of hypnosis 'goes to the weight, not the admissibility' of the evidence. If they discussed the point at all, the courts simply noted that the witness believed he was testifying from his own memory and that his credibility could presumably be tested by ordinary cross-examination.

As the use of hypnosis as a tool for memory recall by law enforcement agencies became more prevalent, the courts began to take notice of these dangers, and in an effort to eliminate the suggestion innate to hypnosis, set up a number of safeguards which had to be observed when hypnosis was used if a hypnotized witness' testimony was to be admitted at trial. State v. Hurd, supra.

A third line of cases adopted a rule of total exclusion. People v. Shirley, supra.

Even in those cases where the courts have held the fact of pre-trial hypnosis goes only to the weight of the testimony most have expressed concern about the use of hypnosis for memory refreshing purposes in the judicial process. See Adams, supra.

The latest case to follow the "majority rule" - State v. Brown, 337 N.W.2d 138 (N.D. 1983) - conceded that the court was "not unaware of the potential for abuse in the use of hypnotically induced testimony in a criminal trial" and proceeded to recite the facts in the case which it found to be significant in reaching its decision to hold such evidence admissible. Among these were that the hypnotist was trained and experienced; a record was made of the hypnotic sessions and both of the hypnotic sessions were videotaped; prior to trial the state made available these videotaped recordings to defense counsel for his inspection; and both parties called expert witnesses who gave their opinion as to the reliability of hypnosis in general and as to the possibility of impermissible suggestions during the hypnosis of the witness.[12] The significant factors the court found safeguarded the testimony against abuse of the hypnosis procedure in Brown are strikingly similar to those espoused by Dr. Orne in State v. Hurd, supra.

Other than Greer, supra, we have found no Missouri appellate opinion deciding the role of hypnosis in the criminal justice system of the State of Missouri. We believe the holding of Greer, in view of the trend of the

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12. The "hypnotist" the North Dakota Court found to be qualified was an agent of the North Dakota Crime Bureau, who had completed 90 hours of formal classroom training in the use of investigative hypnosis, 40 hours of which was basic training in investigative hypnosis at the Law Enforcement Hypnosis Training School at Los Angeles, California, and advanced training in sessions in Los Angeles and Orlando, Florida.

The expert for the state on hypnosis was Dr. Reiser. Dr. Diamond testified for the defense and is a nationally renowned expert in the field of hypnosis; Professor of Law, University of California, Berkeley; Clinical Professor of Psychiatry, University of California, San Francisco; M.D. 1939, University of California, San Francisco; author of *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 Calif. L.Rev. 317, (1980).

recent decisions considering the question, is not and should not be the law of this state.

This case does not involve a question of the admissibility of evidence shown to have been the product of hypnosis. At trial the only evidence that M.B.G. had undergone hypnosis came in during cross-examination of M.B.G. by appellant's counsel. Nor is it the classical case where the witness either was unable to remember the incident or identify anyone as the culprit prior to hypnosis. See People v. Gonzales, 108 Mich.App. 145, 310 N.W.2d 306 (1981); State v. LaMountain, 611 P.2d 551 (Ariz. banc 1980); State v. Hurd, supra; People v. Hughes, supra; State v. Brown, supra.

The issue here is whether the hypnosis of M.B.G. was so suggestive that it contaminated her memory of the occurrence so as to bar her in-court identification and testimony and deprived appellant of his right of cross-examination.

To resolve this question we are of the opinion that the threshold question is whether hypnosis is generally acceptable in the relevant scientific community for the purpose of memory retrieval. State v. Hurd, supra. Frye v. United States, supra. The state adduced no evidence on this question and the trial court made no finding with respect thereto. As we have pointed out hereinbefore the Frye Test has been applied by the appellate courts of this state to the polygraph, to neutron activation analysis of hair and blood, and to bitemark evidence. We know of no reason why the test should not be applied to hypnotic procedures employed to refresh or to recall memory.

If it is demonstrated that hypnosis is generally accepted by the relevant scientific community, then we

believe it is necessary to ascertain whether the safeguards proposed by Dr. Orne and the New Jersey Supreme Court in Hurd, or by the Wisconsin Supreme Court in State v. Armstrong, 329 N.W.2d l.c. 394, fn. 23, were satisfied in the conduct of the hypnosis during the hypnotic interview before the post-hypnotic identification testimony of M.B.G. relative to the photographic displays and lineup prior to trial is admissible.

On remand the trial court should inquire carefully into the qualifications of the hypnotist who put M.B.G. under hypnosis and make a finding on that issue prior to the new trial. While there are a number of cases we have found in the course of our research wherein deputy sheriffs, police officers, state troopers, and others associated with law enforcement agencies have hypnotized witnesses during the course of investigating a crime, in most of the cases the question of their qualifications to apply hypnosis was not challenged. However, in a number of these cases the trial court was directed by the appellate court to scrutinize the qualifications of the hypnotist closely. See Polk v. State, supra, 427 A.2d l.c. 1049.

Resolutions have been adopted by the two major professional associations in the hypnotic field condemning the employment of hypnosis by minimally trained police personnel. In October, 1978, the Society for Clinical and Experimental Hypnosis adopted a resolution wherein it stated that it "views with alarm the tendency for police officers with minimal training in hypnosis and without a broad professional background in the healing arts to presumably facilitate recall of witnesses or victims privy to the occurrence of some crime. Because we recognize that hypnotically aided recall may produce either accu-

rate memories or at times may facilitate the creation of pseudo memories, or fantasies that are accepted as real by subject and hypnotist alike, we are deeply troubled by the utilization of this technique among the police. It must be emphasized that there is no known way of distinguishing with certainty between actual recall."

"Police officers typically have had limited technical training and lack the broad understanding of psychology and psychopathology. Their orientation is to obtain the information needed to solve a crime rather than a concern focusing on protecting the health of the subject who was either witness to, or victim of, a crime. Finally, police officers understandably have strong views as to who is likely to be guilty of a crime and may easily inadvertently bias the hypnotized subjects memories even without themselves being aware of their actions." 27 Int'l J. Clin. & Exp. Hyp. 452 (1979).

In August, 1979, an identical resolution was adopted by the International Society of Hypnosis, id., at p. 453.

The erasure of the tape recording of M.B.G.'s hypnosis is, in our opinion, evidence of gross ineptitude on the part of the hypnotist. He admitted that as a part of his training in hypnosis he was advised that he should maintain a permanent record of the hypnotic interview - as a minimum at least a stenographic record - because it is impossible to go back at a later date and determine whether, in fact, any suggestion, unwittingly, unintentionally, or of any kind, was made without such a record. Even if a transcript of the record would serve this purpose, none was made here.

Neither party has cited us any appellate opinions in support of their respective positions which have ruled

on the impact the erasure of the tape recording of a hypnosis interview has upon the admissibility of the testimony of a witness who has undergone hypnosis for the purpose of memory enhancement.

In Pearson v. State, 441 N.E.2d 468 (Ind. 1982), the tape recording of the hypnotic interview of the victim, undertaken to refresh her memory of the incident and and to see if she could remember any further details were inaudible. Defendant filed a pre-trial motion to suppress the victim's testimony and presented evidence that the victim's memory of the incident had been contaminated and altered because of the hypnotic interview. He also offered testimony in support of his contention that her memory would be incompetent, irrelevant, and prejudicial.

The court found that the hypnosis was very unreliable because few of the Hurd safeguards were observed. Despite the fact the tapes were inaudible, the court said there was evidence that improper suggestions were made to the victim while undergoing hypnosis, which included showing her the defendant's picture. However, the only facts the victim changed after the hypnosis session were the color of the defendant's shirt, the possibility that he was wearing a hat, and how much of his face she actually saw during the crime. Her identification of the defendant and her description of the major incidents of the crime were not changed. Under the facts of the case the court held that there was no error in the admission of the victim's testimony and in the trial court's overruling of the defendant's motion to suppress.

The facts in Pearson are similar in some respects to those in the case before us for decision. The victim in

Pearson was attacked by a masked intruder in the living room of her trailer. At one point during the course of the rape he pulled the mask up over part of his face in order to kiss her and she was able to observe the lower part of his face; and the victim felt whiskers and a mustache when she tried to push him away.

Facts present in Pearson which are not present here were that the victim recognized her assailant's voice since he had lived next door to her for three years. Immediately after the incident the victim told the police that she was sure defendant was the person who raped her because of his voice and the comments he made about where she worked.

All of this evidence, including the hypnotic session, was before the jury and the court said, "Therefore the jury could infer that the victim's statements which in any way resulted from the hypnotic session were unreliable."

In Polk v. Maryland, supra, an eight year old victim of sexual crimes was hypnotized. The hypnotic interview consisted of a "preliminary interview" of 20 to 25 minutes, followed by a hypnotic session of some 25 to 30 minutes duration. The entire session was taped; however, through some "inadvertance" the preliminary session had been erased. At the pre-trial suppression hearing the remainder of the tape was played for the court.

On appeal there was no issue raised about that portion of the interview which had been erased and the court did not make an analysis or decide the impact of the erasure on the admissibility of the witness' testimony. The court did, however, hold that on remand if the trial court found hypnosis satisfied the Frye Rule,

there were factors bearing upon admissibility of the child-victim's testimony to which the trial judge would have to give careful consideration.

The Supreme Court of Wyoming in Chapman v. State, supra, considered a case where the witness gave a general description of the burglar and shortly later was hypnotized on two separate occasions. He added some details to the previously given description after each session. These sessions were videotaped but the tapes for the most part were inaudible. On the day of trial, appellant objected to the identification testimony of the witness since it was enhanced by the use of hypnosis and the failure of the videotapes prevented effective cross-examination and prohibited his expert from viewing the procedures used by the state's hypnotist. The trial court ruled that the state could not mention hypnosis during opening statements and would not present any evidence on hypnosis unless the "defendant opens the gate" on the subject of hypnosis. The state was to be restricted to the witness' identification of appellant based on what the "state contends was by reason of the episode that took place where he was assaulted."

With respect to the appellant's contention that he was denied effective assistance of counsel by reason of its failure to make available to him an audible videtotape of the hypnotic sessions, the Supreme Court said ". . . although, a recording of such sessions would assist in establishing the credibility of the testimony of the witness, it is not a foundation requirement for such testimony."

In a vigorous dissent, it was pointed out that while the one videotape was totally inaudible, there was testimony that 60 percent of the other two tapes could be

heard "if you listened very closely." The majority opinion may be explained as a logical extension of Wyoming's acceptance of the "majority rule" that the testimony of a witness who had undergone hypnosis is admissible and the fact of hypnosis goes only to the credibility of the testimony. However, in our opinion, since its position on the admissibility of such testimony is out of step with the more recent appellate decisions considering the question, it's precedential value on the issue before us is nil.

The Appellate Court of Illinois in People v. Smrekar, supra, had a case where no records were kept of the questions asked and the answers given during the hypnotic sessions. The hypnotist was a doctor and a general practitioner, who had used hypnosis in his practice for 10 to 15 years. He was not board certified but "he was certified in the sense that he was licensed to practice medicine generally . . . ." The doctor testified concerning the procedures he employed in the hypnosis and the court said, "Although greater safeguards would be maintained by following the procedure suggested in the *Adams* footnote, we find the doctor here to have been shown to be competent and his procedure to have not been unduly suggestive." Smrekar, supra at 855.

However, the United States District Court for the Northern District of Georgia, in a habeas corpus proceeding granted two Georgia state prisoners habeas corpus and ordered vacation of their convictions and retrial of the petitioners within 120 days, because the state had suppressed audiotapes and transcripts of hypnotic sessions during which the prosecution's key witness had had her memory "reconstructed." Although the cause turned on Brady questions, the court observed in a footnote that

in the event of retrial "serious issues remain with respect to Deborah Kidd's (the prosecution's witness) competency to testify" when Brady material has been deliberately or even inadvertently destroyed by the state or its agents. Emmett v. Ricketts, 397 F.Supp. 1025, l.c. 1048, Fn. 39 (1975).

Appellant makes no Brady allegations here; in fact he was notified prior to trial of the hypnosis of M.B.G. Nevertheless, the erasure of the taped record is certainly a further bit of evidence of the unreliability of the hypnosis, if nothing more.

One of the safeguards mandated in some of the cases, and recommended in others, is the preparation of a stenographic record, a taped recording, or a video-tape of the session. If this safeguard is to have any value the preservation of that record is necessary so that an accused may effectively ascertain whether the session was unduly suggestive so as to contaminate the witness' memory. Where the tape has been erased it becomes well nigh impossible for the judge, in the first instance, or the jury at trial, to reach a conclusion whether the hypnosis contaminated the witness' memory and rendered the witness' testimony unreliable.

From the cases we have read we have discerned that because of the suggestive nature of hypnosis the subject will tend to shape his "recall" in response to intentional or inadvertent cues from the questioner. "These cues may be as obvious as leading questions or as subtle as the inflection of the questioner's voice or degree of apparent approval by the hypnotist . . . . Because of the unpredictability of what will influence a subject, it is difficult even for an expert examining a videotape of a

hypnotic session to identify possible clues." State v. Hurd, 432 A.2d l.c. 93.

While the hypnotist, M.B.G. and her sister testified there was no suggestiveness concerning the identification of a suspect during the hypnosis session, whether there were cues, so subtle as not to be detected by them, or other suggestions made during the session, is no longer available to the appellant because of the erasure of the tape.

None of the cases dealing with the question of tape recordings we have discussed heretofore deal with the situation we have here - i.e. where the hypnotist himself deliberately erased the tape recordings of the hypnotic session.

The question is what was there which could have been suggested to M.B.G. during the hypnotic session? Appellant, when the hypnosis was conducted was not, so far as the evidence adduced at the hearing on the motion to suppress demonstrates, a suspect.[13] The only description the police had at that time was that given to them by M.B.G. the night of the offense and Mr. Mosby's description of the man he saw knocking on the door of the apartment occupied by the victim. That description was: "Rather medium in build all around,

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13. William McHugh, an investigator for the Cape Girardeau Police Department testified at the hearing on the motion to suppress, that appellant became a suspect in "the first part of December, 1980, and he was seeking a right profile of him for use in investigation purposes." Appellant, fortuitously, came into Police Headquarters because he was applying for a security job and needed his fingerprints and photograph taken to aid in his application. A copy of the photograph taken at that time was later displayed to M.B.G. in a photographic display on December 23, 1980, and selected from the array as a picture of the man who raped her.

not tall. I want to say Afro-American, but it wasn't exactly that. It was more like a mulatto-type appearance to me." He further described the man as an Afro-American, approximately 17 years old, medium build, 150 pounds, black hair, medium in length.

At trial there was some evidence that the Cape Girardeau Police Department, through Lieutenant Ross, had at least a general description of the rapist. Although Lieutenant Ross was not called as a witness at the pretrial hearing by either party, he testified at trial that while en route from his home to police headquarters at about 7:00 p.m. on August 13, 1980, he heard a radio call from a female police officer calling for help. At that time he was by the tennis courts near the college. He ascertained that the woman police officer was on Pearl Street and a suspect had gotten away. The suspect was described as a black male, five feet eight inches tall, 160 pounds, wearing bluejeans and a checkered shirt.

He proceeded to the area in search of the suspect and while doing so observed a man come running down the sidewalk, and stop at the edge of the sidewalk as Lieutenant Ross was approaching him in the patrol car. The Lieutenant stopped the car within 10 to 15 feet to talk with him, but the man broke and ran towards a nearby alley and made good his escape. The man fit the physical description he had heard on the radio except that the clothes he had on were different. He observed the man's face for "around a minute" in the daylight. After the man escaped he continued searching the area and "put out a broadcast." The man was not found. At trial Lieutenant Ross identified appellant as the man. The record does not reveal what kind of "broadcast" Lieuten-

ant Ross put out, nor does it indicate whether he furnished the police department with a description of this man he later identified at the trial as the man he saw that day.

Although not developed at the pre-trial suppression hearing, Gary Niswinger,[14] a security officer for the Southeast Missouri State University in Cape Girardeau, testified at trial that the "City" gave to the security officers at that institution a composite drawing of a suspect "within days of the rape" and this composite drawing was posted on the bulletin board at the University.[15]

William McHugh, an investigator of the Cape Girardeau Police Department, and one of the lead investigators in the investigation of the crime, testified at the motion on the hearing to suppress that during a photographic array displayed to M.B.G. on October 16, 1980, she picked out a photo of a juvenile and said that he had features "close" or "similar" to those of the man who had attacked her, but she was not "definite." The record is devoid of any further evidence relative to this juvenile. We assume that the subsequent identification of appellant as the culprit cleared the juvenile.

How much of the information, if any, concerning the description of the rapist in the possession of the Cape Girardeau Police Department was known to the hypnotist when he conducted the hypnotic session of M.B.G.

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14. This witness too was hypnotized.

15. Where this "composite" came from is unexplained. At the pre-trial suppression hearing of April 21, 1981, Mr. Mosby testified that after he was hypnotized on September 5, 1980, there was an attempt made to create a composite sketch of the man he saw at the apartment on August 13, 1980, but, "we couldn't get any picture at all."

is not revealed in the record on appeal. At the suppression hearing he testified, "I knew the date and time frame and that kind of general information. I had scanned a handwritten piece of paper and that was all." When he conducted the hypnosis he had never heard of this appellant and so far as he knew there was no suspect in the case, and the victim, prior to being placed under hypnosis, was not asked, nor did she give, any description of her assailant to him. He did admit that during the dehypnotization stage of the session he told the victim, "you will remember what you want to. You'll feel more positive about the incident. You'll consider it as an experience that is past, over, happening; although unpleasant, something you can live with, as over and done with. You'll be free from torment so that you may sleep restfully." He did not cover in his testimony, however, the extent of his knowledge of the description possessed by the Cape Girardeau Police Department prior to the hypnotic session.

The testimony of the victim and her cousin is that the hypnotist did not explicitly suggest a description of the rapist. There was no evidence that the victim had ever seen the appellant at any time prior to the date of the rape.

Because of the unreliability of hypnosis as a memory recall procedure we are called upon to review the action of a trial court who apparently was influenced by the Greer decision, handed down by the Western District of this court on November 30, 1980. The pre-trial suppression hearing was held on April 24, 1981. There was no other Missouri appellate decision to guide the trial court in ruling on whether the hypnotized witness should

be barred from testifying in the case. Without her testimony the prosecution had no case.

It is clear, we believe, that by reason of the holding in Greer, the trial judge opined that since the fact of hypnosis went solely to the credibility of the victim, and not to the admissibility of her testimony, the erasure of the tape was merely a circumstance that the jury might consider in assessing her credibility relative to the identity of appellant as the rapist.

At the time these motions were heard the more recent cases dealing with hypnosis had not been decided, and most of the cases cited as authority by the Greer court as authority had not as yet been overturned.

Appellant's counsel, because his client was indigent, and the resources of the public defender's office were exhausted,[16] was denied the resources to present expert testimony to support his contention that the hypnosis in this case was conducted in such an unprofessional manner as to contaminate the witness' testimony and lay a proper evidentiary basis for appeal. The experts in the field are almost unanimous in requiring a tape or video recording of hypnotic sessions to demonstrate their freedom from suggestiveness. We are appalled by the number of appellate decisions either adopting or recommending safeguards to assure, as far as possible, the reliability of a procedure which is not generally accepted as appropriate for enhancing memory recall, but, nevertheless,

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16. We cannot ignore the fact, known to all in the judicial structure of the State of Missouri, that the Public Defender's offices throughout the state were independent and operating on a shoestring budget. It was, in our opinion, the state's burden to present the evidence necessary to demonstrate by clear and convincing evidence that hypnosis satisfies the Frye test.

admit such memory enhanced testimony when one or more of those safeguards have been ignored in cases where a person's freedom is at stake.

What concerns us is whether the hypnotist, the victim and her cousin would recognize suggestiveness in the hypnotic process if they saw it. We would expect that the hypnotist would deny that he knowingly made any suggestions to the victim which would subsequently lead to her identification of a person as the culprit. Nor do we believe the victim under hypnosis nor her cousin are qualified to make such a judgment.

Dr. Orne pointed out that there are many cases involving a victim who cannot recall potentially important details and where the law enforcement authorities are equally in the dark, e.g. in cases of assault. In some cases of that type hypnosis has made it possible for the victim to recall the assailant's appearance, enabling police artists to draw a reasonable likeness. To the extent that the victim or witness, police, artist and hypnotist alike share no preconceived bias about what might have occurred, the situation approaches the ideal case for hypnosis to be most appropriately employed to develop investigative leads. If the sole purpose of the hypnotic session is to provide clues which ultimately lead to incriminating evidence, the fact that hypnosis was originally employed becomes irrelevant.

However, Dr. Orne also states that if there is even the vaguest possibility that hypnotically enhanced recall is to be used in court, "it is essential that the entire contact of the hypnotist with the subject be videotape-recorded in order to allow an independent assessment of the events preceding, during, and following the hyp-

notic session to determine whether or not the memories might have inadvertently been guided by cues in the situation." 27 Int'l J. Clin. & Exp. Hyp. 328 (1979).

At the time of this hypnosis the following circumstances existed. The victim had told Officer Boudinot in response to a query whether she "saw his face" that she had not been able to see the assailant's face because it was covered by her "shirt." The initial description of the rapist given to the police was of a right profile and limited in scope. We think it is clear that the purpose of the hypnotic session was to develop more facts to aid in the solution of the crime.

Nevertheless, we believe that inasmuch as the tape of the hypnotic interview was erased and it is impossible to ascertain whether the session was so suggestive so as to contaminate the in-court testimony of M.B.G., any testimony concerning the post-hypnotic photo arrays and the physical lineup should not have been admitted at trial and appellant was prejudiced thereby.

Nevertheless, we also conclude there was no error in admitting M.B.G.'s in-court identification of appellant as the rapist in that she had an independent basis, aside and apart from the post-hypnotic photographic arrays and the physical lineup for her identification of the appellant.

She had an opportunity to view her assailant during the course of the rape. The lighting conditions in the apartment were adequate; so light that she did not have to turn on the lights to see. When she entered the bedroom area, she turned on the bathroom light, flooding the room in which she first observed the rapist with light. During her struggle with the rapist the shirt he was wearing on his head came free from the right side

of his face when she and her attacker were 6 inches apart, so she was able to get a right profile view of his face for 2 seconds to a minute. Despite her initial statement to Officer Boudinot that she did not see his face because he had a shirt covering it, she did tell the police that her assailant was "a young, broad shouldered black, slender body, 140 pounds, 5 feet 7 inches tall, clean shaven, of smooth cheekbone, rounded jaw and chin."[17]

In State v. Higgins, supra, a witness who viewed one robbery suspect for 10-15 seconds was held to have had ample opportunity to identify the suspect, 592 S.W. 2d l.c. 160. Similarly, a witness was permitted to identify a defendant he had observed for 3 to 5 seconds. State v. McGrath, 603 S.W.2d 518, l.c. 521 [4] (Mo. 1980). The Missouri courts hold that the lighting of the crime scene or the length of time the witness has to view the suspect in an out-of-court identification situation goes to the weight of the identification testimony and is a matter for the jury to decide. State v. Carson, 501 S.W.2d 503, 506 [1] (Mo.App. 1973).

Appellant's final Point is that "the trial court erred in failing to sustain appellant's motions to dismiss pursuant to Supreme Court Rule 25.16 because M.B.G. and Joe Mosby were subjected to hypnotic questionings by members of the Cape Girardeau Police Department and tapes of said questionings were destroyed."

Respondent contends this Point is not preserved for review because it failed to state "wherein and why" the trial court's action was erroneous as required by Rule 30.06(d).

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17. At trial, appellant testified that on the date of the rape he was 5 feet 11½ inches tall and weighed 175 pounds.

Rule 30.06(d) requires: "The points relied on shall state briefly and concisely what actions or rulings of the court are sought to be reviewed and wherein and why they are claimed to be erroneous with citations of authorities thereunder."

While we are of the opinion that the point, as stated, does not preclude the question for review, we shall nevertheless dispose of it.

On March 10, 1981, appellant filed a motion to compel discovery pursuant to Rule 25.16 requesting discovery of the tape recordings of the hypnotic sessions. At the hearing on this motion the hypnotist testified that the tape had been erased pursuant to the policy of the Cape Girardeau Police Department; that it had not been the policy of that department to maintain a permanent record of such procedures.

Appellant contends that the failure or inability of the prosecutor to comply with his discovery request for the tapes resulted in fundamental unfairness to him in that he was thereby effectively denied his Sixth Amendment right to cross-examine M.B.G. and Mr. Mosby.

The state responds that the court's ruling was not an abuse of discretion because the tapes were destroyed, through no fault of the state, months prior to appellant's request for discovery, and appellant made no showing that the tapes contained material evidence nor that the state was responsible for their safekeeping, and therefore it is not in violation of the discovery rules.

In a criminal prosecution the basic object of discovery for a defendant is to permit him an opportunity to prepare in advance of trial to meet the charges against

him and to avoid surprise. Discovery extends to an accused the fundamental fairness the adversary system aims to provide. State v. Sykes, 628 S.W.2d 653, 656 [10] (Mo. 1982). The criminal discovery rules were structured to preclude surprise and afford the accused information with which to formulate a defense and meet opposing evidence. State v. Trask, 581 S.W.2d 417, 421 [10] (Mo.App. 1979).

One of the purposes of pre-trial discovery is to give the accused an opportunity for effective cross-examination. State v. Buckner, 526 S.W.2d 387, 392 (2) (Mo.App. 1975). He should have . . . "the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them." Smith v. Illinois, 390 U.S. l.c. 132, quoting Alford v. United States, 282 U.S. 687, 692, 51 S.Ct. 218, 219, 75 L.Ed. 624, 628 (1931).

The state argues, however, that according to Rule 25.02, discovery may not commence until the filing of the information - in this case February 19, 1981 - and by that time the tapes had already been erased; that appellant's motion for discovery wasn't filed until March 10, 1981, months after the tapes had been erased, and that they were therefore "unavailable due to no fault of the state."

This line of argument fails to address itself to the crucial question which is whether there was a duty to preserve the tape recording of the hypnotic sessions so that they would be available to validate the procedures employed by the hypnotist and demonstrate that the session was conducted in a manner which did not contaminate the victim's post-hypnotic identification of appellant.

No Missouri appellate opinion has considered this question. It has been held that the law does not require

the police to retain photographs used in a photographic showup for the eventuality of a trial. State v. Lewis, 637 S.W.2d 421, 422 [1] (Mo.App. 1982); State v. Franklin, 547 S.W.2d 849, 852-53 [4] (Mo.App. 1977). The reasoning for this holding is that to require segregation of all photographs shown to witnesses in the investigatory stage of all crimes would be to place an intolerable burden upon investigatory processes at a time when these premises are already overtaxed. 547 S.W.2d l.c. 852.

There is also a line of authority holding that where policemens' notes or memoranda of interviews with victims or witnesses during the investigation of a crime cannot be found or have been destroyed, the trial court was not guilty of error in overruling defendant's motion to strike the testimony of the victim or witness on the grounds that the state had failed to comply with a discovery order, or that the state was guilty of suppression of evidence under the circumstances peculiar to the case. State v. Reynolds, 422 S.W.2d 278, 283 [7] (Mo. 1967).

Where the state failed to produce x-rays entrusted to its care between trials because they could not be located at the time of appellant's trial, the appellate court held, "the fact that the prosecution could not locate physical evidence entrusted to it does not relieve it of its responsibility. If the prosecution loses or in some way deprives the defense the use of an item of material evidence entrusted to it, a new trial will be ordered irrespective of the good or bad faith of the prosecution." State v. Carr, 610 S.W.2d 296, 298 [1] (Mo.App. 1980).

We believe that where, as here, the item sought by discovery is the tape recording of the hypnotic interview of an investigating police officer with the victim or a

witness to a crime, the duty to preserve the tape is upon the policeman - hypnotist and the state. The experts in hypnosis almost unanimously agree that the hypnotic sessions must necessarily be taped so the hypnosis procedure can later be validated. The hypnotist in this case acknowledges that even in his limited training he learned this requirement. Therefore, if the purpose for which the tape recording of the hypnosis interview is to afford the judge and the jury an opportunity to evaluate the procedures employed by the hypnotist and the reliability of the witness' recall, destruction or erasure of the tape defeats the purpose of the tape recording.

The only sanction sought by appellant was dismissal of the charges. We do not believe the denial of this request was an abuse of the trial court's discretion.

We reverse and remand with directions.

On remand, the trial court should conduct an evidentiary hearing and make a finding whether hypnosis satisfies the Frye test. If it is then determined that hypnosis is a generally accepted scientific procedure for memory recall, the trial court should then make a finding whether the hypnotist in this case possesses the qualifications necessary for one to employ hypnosis for memory recall, and, if so, whether the procedure he employed in this case complies with those safeguards for reliability set out hereinabove so that the victim's in-court identification was not contaminated and appellant was thereby deprived of his right to confront the victim guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution. Unless these findings are affirmative, the victim should be barred from testifying at retrial concerning the post-hypnotic pre-trial photographic displays and physi-

cal lineups wherein she identified appellant as the man who raped her.

Because this opinion conflicts with the opinion of the Western District of this Court in State v. Greer, supra, and because of the general interest or importance of the question involved in the case, we order the cause transferred to the Supreme Court pursuant to the authority of Rule 83.02.

/s/ John J. Kelly, Jr.
John J. Kelly, Jr., Judge

/s/ James A. Pudlowski — Concurs
James A. Pudlowski, Presiding Judge

/s/ Robert O. Snyder — Concurs
Robert O. Snyder, Judge

APPENDIX

Giannelli, *General Acceptance of Scientific Tests - Frye and Beyond,* in Scientific and Expert Evidence, p. 11 (2d ed. 1981).

Alderman and Barrette, *Hypnosis on Trial: A Practical Perspective on the Application of Forensic Hypnosis in Criminal Cases.* 18 Crim. L. Bull. 5, (1981).

Note, *The Use of Hypnosis to Refresh Memory: Invaluable Tool or Dangerous Device?* 60 Wash. U. L. Q. 1059 (1982).

E. Margoin and S. Coliver, *Forensic Use of Hypnosis: An Update,* Trial Magazine, p. 45 (October, 1983).

(Dated March 25, 1981)

IN THE
CIRCUIT COURT OF CAPE GIRARDEAU
COUNTY AT JACKSON, MISSOURI
32nd Judicial Circuit, HON. STANLEY
A. GRIMM, Judge, Division I

No. CR581-50FX

STATE OF MISSOURI,
Plaintiff,

-vs-

LEATRICE LITTLE,
Defendant.

TRANSCRIPT OF HEARING ON MOTIONS - MARCH 25, 1981

* * *

[23] THE COURT: Mr. Robbins, what is the motion that we are taking up at this time, Mr. Robbins?

MR. ROBBINS: We filed a Motion for Authority to Hire an Expert Witness filed March 20, 1981. Judge, the evidence on this motion will not take very long.

PATRICIA SCHREINER,

being duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION BY MR. ROBBINS:

Q. Would you please state your name. A. Patricia Schreiner.

Q. Mrs. Schreiner, are you employed? A. Yes, I am.

Q. And where are you employed, please? A. In the Public Defender's Office.

[24] Q. In fact, are you employed as my secretary? A. Yes, I am.

Q. In that capacity do you have the function of maintaining the books, specifically the expenses of the 32nd Judicial Circuit Public Defender's Office? A. Yes, sir, I do.

Q. In your ordinary course of business do you keep records reflecting what the financial condition is of that office? A. Yes, sir.

Q. As of this date, March 25, 1981, do you have a record as to what funds are available to this office for the purposes of paying bills other than salaries? A. Yes I do.

Q. Would you tell this Court how much money is in that pot? A. $87.38.

Q. Do you have a record that you are maintaining at this time in your ordinary course of business as to bills outstanding for this circuit, this Public Defender's Office in this circuit? A. I have bills totalling $1,217.18, which need to be paid.

Q. And those bills have been pending in this office for what period? A. Since the first of February.

Q. Is it anticipated that this office will receive additional funding sometime prior to June 30th of 1981? [25] A. On April the 1st we should receive $2,385.

Q. Of that $2,385 is the $1,200 in bills pending, will that come from that $2,300? A. Yes.

Q. Between now and when that twenty-three hundred dollars becomes available, do you anticipate this office accumulating more debts? A. Yes, I do.

Q. When that twenty-three hundred dollars becomes available, and when you satisfy the debts occurring or are in our office as of April 1st, what do you expect the financial condition will be of this office as to money remaining for purposes of paying bills from April to June 30th? A. I expect we'll end the fiscal year June 30th about three months into the 1982-83—'81-'82 budget, I'm sorry.

Q. Do we have anywhere from $500 to $1,000 on this date with which to hire a psychiatrist in the defense of Leon Little? A. Not to my knowledge.

MR. ROBBINS: I have no further questions,—yes I do.

Q. Have you, as secretary in this office, in conjunction with your duties, submitted a request to the Public Defender Commission for funding for this purpose? A. Yes, I have.

Q. Is it not true that you submitted that letter on the 20th of March, 1981? [26] A. I hope that's true; I don't have the letter before me.

Q. Sometime in the near past? A. Yes.

MR. ROBBINS: I have no further questions for this witness.

THE COURT: Mr. Ferrell?

MR. FERRELL: No questions, Your Honor.

THE COURT: All right, you may step down. Call your next witness, please.

MR. ROBBINS: Judge, I have no further witnesses to call on this case, and I would just argue the motion very briefly.

THE COURT: Do you have any witnesses, Mr. Ferrell?

MR. FERRELL: None, Your Honor.

THE COURT: All right, Mr. Robbins.

MR. ROBBINS: Judge, several of the motions, at least one of the motions which will be heard shortly, involve an hypnotic test performed by the Cape Girardeau Police Department. We are in a position to offer to this court law regarding hypnotic interviews. The suggestibility which relates to the total problem today, which will be identification testimony at the trial schedule for April, we need such an expert—that expert being a psychiatrist or psychologist, whoever it is, who is versed in hypnosis, hypnotic interview, and the suggestibility which is inherent in that process, for proper presentation for Leon Little. Judge, we would ask the Court to order such an expert. That the State of Missouri—not the Public [27] Defender's Office, because we have no funds—pay for such expert, and we would ask that that be done immediately so that we can properly represent this defendant as to anticipated motions and present proper cross-examination at trial.

THE COURT: The Motion for Authority to Hire Expert Witnesses is overruled and denied.

MR. FERRELL: Your Honor, may I make one statement?

THE COURT: Yes, Sir.

MR. FERRELL: Very briefly. I notice in line 3 in that Motion for Authority to Hire Expert Witness, Mr.

Robbins states that we, the Cape Girardeau Police Department does have and has used the services of an expert in the investigation and preparation of this case for trial. I'm just questioning if they concede that Mr. Lincecum is an expert in the area of hypnosis, as they allege?

THE COURT: Apparently he has made that statement.

MR. ROBBINS: Your Honor, if Mr. Ferrell will read further, he will note that the word expert contains some little marks around it. We are certainly questioning that.

MR. FERRELL: So, just for the record, they're not—you haven't established that we had employed an expert. Very fine.

MR. ROBBINS: At this time I have done nothing of that nature.

THE COURT: The Motion for Authority to Hire Expert Witness [28] is overruled and denied. Now then, can we get to a motion that involves people that are not employees of the State or City?

MR. ROBBINS: I think the motion that will involve several witnesses does resolve around the hypnotic interview. We have a motion to dismiss this case for the intentional destruction of evidence by the Cape Girardeau Police Department.

THE COURT: Let's go off the record.

[At this time there was a brief discussion off the record.]

* * *

(Filed February 29, 1988)

IN THE
CIRCUIT COURT OF CAPE GIRARDEAU COUNTY,
MISSOURI
AT JACKSON

Case No: CR581-50FX

STATE OF MISSOURI,
Plaintiff,
vs.
LEATRICE LITTLE,
Defendant.

MOTION FOR AUTHORITY TO HIRE EXPERT WITNESS

Comes now the defendant by and through his attorney Gary L. Robbins, Public Defender for the Thirty-Second Judicial Circuit, and presents his Motion for Authority to Hire Expert Witness as follows, and prays this Honorable Court to require the State of Missouri or its political subdivision to provide funds to the defendant in an amount sufficient to allow him to have an adequate defense, due process of law, and a fair trial. In support of this motion, defendant states:

1. Defendant is charged with the crime of forcible rape.

2. Defendant has been declared an indigent person.

3. The state has used the services of an "expert" in the investigation and preparation of this case for trial.

Said expert may be subpoenaed by the state to appear as a witness against the defendant, and was paid by the state, and has contributed significantly to the state's case against the defendant.

4. In order to provide an effective defense, the defendant requires the assistance of an expert witness both to assist in the preparation of his case and to assist in the cross-examination of the state's expert witness and witnesses offering identification.

5. The Public Defender's office has no funds available for the employment of experts.

6. Failure of the court to order funds for an expert witness to be provided for the defendant will violate his Sixth and Fourteenth Amendment rights to effective assistance of counsel, equal protection and due process of law.

7. Section 600.040 RSMo provides that the cost of ". . . expert witnesses, and the preparation of exhibits *necessary to conduct the representation shall also be paid by the state*". Due to the lack of funding in this office of the Public Defender for the Thirty-Second Judicial Circuit, defendant requests this court to order the state treasurer to advance such funds as necessary for the hiring of an expert to adequately prepare the defense of Leatrice Little.

8. Defendant has requested funds for an expert from the Public Defender Commission of the State of Missouri, but as of yet, no funds have been allocated (see attached letter).

9. Since the defendant has no funds and since this office has no funds, the failure of this court to enter the requested order for funds to hire an expert would

be a denial of the defendant's constitutional rights to due process, equal protection and effective assistance of counsel, all guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

10. Specifically, the defendant is in need of the following expert to aid and assist his attorney in the investigation and preparation of his case for trial:

(a) A trained psychiatrist or psychologist who is an expert in the administration of hypnosis, the techniques of an hypnotic interview and knowledgeable in the psychology of hypnosis and its effects on memory.

11. Prior to undergoing hypnosis, the prosecutrix Mary Beth Greaser said she did not see the assailant's face. Sometime after undergoing hypnosis administered by the state's "expert", Mary Beth Greaser was able to say she saw a portion of her assailant's face during the alleged rape and thereafter, was able to identify him by recognizing his face in a lineup and in a photo throwdown.

12. At the trial and at a motion hearing to suppress statements, such an expert would be essential to the defendant in the preparation and cross-examination of the state's expert and the prosecutrix Mary Beth Greaser. Therein, the requested expert would help defendant effectively cross-examine the state's expert and Mary Beth Greaser as to the suggestibility of the hypnotic session and inform the trier of fact as to the problems inherent with hypnosis.

13. Neither the Public Defender nor the investigator, the Assistant Public Defender nor the secretary to the

Public Defendant are qualified and trained as the above requested expert.

WHEREFORE, defendant prays the court to make and enter an order providing adequate funds to be advanced by the State of Missouri or its political subdivisions, to meet the requirements as outlined in this motion.

Office of the Public Defender
Thirty-Second Judicial Circuit
Courthouse
Jackson, Missouri 63755
314-243-3949

By /s/ Gary L. Robbins
Gary L. Robbins
Public Defender
Missouri Bar No. 23265

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 87-1532

BILL ARMONTROUT, WARDEN,

Petitioner,

vs.

LEATRICE LITTLE,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

TOBY H. HOLLANDER
Counsel for Respondent

145 Lisbon, 7th Fl.
Lewiston, Maine 04240
(207) 784-1558

Comes now Respondent, Leatrice Little, by and through his Counsel, Toby H. Hollander, and moves this Court, pursuant to Rule 46, Rules of the Supreme Court of the United States, and moves this Honorable Court for leave to proceed in forma pauperis.

Respondent's affidavit is in support thereof is attached hereto.

Respondent proceeded in forma pauperis in the state courts below. No request to proceed in forma pauperis was presented in the federal courts below.

The Petitioner, by counsel, Patrick L. King, Esq., has authorized counsel for Respondent to state that Petitioner has no objection to the granting of this Motion.

WHEREFORE, Respondent prays that this Court grant him leave to proceed in forma pauperis.

TOBY H. HOLLANDER
Counsel for Respondent

Toby H. Hollander
145 Lisbon St., 7th Fl.
Lewiston, ME 04240
(207) 784-1558

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Leatrice Little, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to the redress granted by the Circuit Court of Appeals.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in the United States Supreme Court are true.

1. Are you presently employed? Yes.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

$5.40 per hour: $936 per month
Old Heritage Advertising and Publishing Company
14535 Manchester Road, Suite 203
Manchester, Missouri.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

3. Do you own any cash or checking or savings account? Yes.

a. If the answer is yes, state the total value of the items owned. $300.00.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding oridinary household furnishings and clothing)? Yes

a. If the answer is yes, describe the property and state its approximate value.

76 Jaguar: Fair market value $5500.00-debt outstanding= $7400.00
U.S. Savings Bonds-- $800.00
1976 Pontiac LeMans-- $400.00
1987 Buick LeSabre-- $00.00 Equity (Fair market value is $12,000, balance on secured note is $12,500.00)

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Mary Little (wife)
Casey Hood (step-son)
Tara Little (daughter)
My wife is due to deliver our second child in August, 1988.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

x Leatrice L Little
Leatrice Little

Subscribed and sworn to before me this 19th day of May, 1988.

Notary Public

My Commission expires: _____.

BEST AVAILABLE COPY

Comes now the Respondent, by and through his counsel, Toby H. Hollander, Esq., and pursuant to Rule 46.7, Rules of the Supreme Court of the United States, and moves this Court to appoint Toby H. Hollander to represent Respondent in this Court pursuant to the provisions of the Criminal Justice Act of 1964, 18 U.S.C. Section 3006A. Said counsel has represented Respondent throughout the habeas corpus proceedings in the courts below and is a member of the Bar of this Court.

Respondent has filed contemporaneously herewith his Motion to Proceed In Forma Pauperis and affidavit in support thereof demonstrating his indigence and financial inability to obtain adequate representation or to meet the necessary expenses in this Court.

WHEREFORE, Respondent prays that this Court appoint Toby H. Hollander, Esq., to represent Respondent in this Court pursuant to the Criminal Justice Act of 1964.

TOBY H. HOLLANDER
Counsel for Respondent

Toby H. Hollander
145 Lisbon St., 7th Fl.
Lewiston, ME 04240
(207) 784-1558

IN THE

SUPREME COURT OF THE UNITED STATES

No. 87-1532

BILL ARMONTROUT, WARDEN,

Petitioner,

vs.

LEATRICE LITTLE,

Respondent.

RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TOBY H. HOLLANDER
Counsel for Respondent

145 Lisbon, 7th Fl.
Lewiston, Maine 04240
(207) 784-1558

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QUESTIONS PRESENTED BY THE PETITION

I.

Whether the Due Process Clause of the Fourteenth Amendment entitles an indigent defendant to the appointment, at state expense, of nonpsychiatric experts to assist in his defense at trial.

II.

Whether an indigent defendant was entitled under the Due Process Clause of the Fourteenth Amendment to the appointment of an expert at state expense absent a showing prior to trial that the expert assistance was likely to be a significant factor at trial.

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RESPONSE TO THE PETITION

I.

The Due Process Clause of the Fourteenth Amendment requires the appointment of an expert to assist an indigent defendant where it is reasonably probable that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial.

The Petition for Certiorari seeks to limit this Court's decision in Ake v. Oklahoma, 470 U.S. 68 (1985), to only those cases which are capital, and to only those experts who are psychiatric. The Petitioner suggests that there is a substantial conflict among the state and federal courts on this question and that the failure to so restrict the Ake decision will open up the floodgates of appellate and collateral criminal litigation. As demonstrated below, neither contention is accurate.

A. There is little, if any, conflict between the state and federal courts over the scope of the Ake decision.

The Petitioner has invoked this Court's discretionary powers in this case citing what he terms a "deepening conflict among the state and federal courts of this country." (Petition, p. 7). The Petition further alleges that at least eight states have adopted rules contrary to the decision of the Eighth Circuit, en banc. An analysis of this alleged "conflict" demonstrates that, far from a

division among the states, there is striking unanimity regarding the principles enunciated by the Eighth Circuit and differing results based only upon the application of specific factual circumstances. Thus, a grant of certiorari to "resolve the conflict" between the states is, for that reason, unnecessary.

Turning directly to those cases in which Petitioner perceives a conflict with the Eighth Circuit (Petition, p. 10), one is first struck by the fact that two of the eight cases cited involved a request for an appointed investigator, not an expert. **Rogers v. State**, 344 S.E.2d 644 (Ga.), cert. denied, 107 S.Ct. 600 (1986); **Pope v. Commonwealth**, 360 S.E.2d 352 (Va. 1987). That issue is not presented by the Petition herein.

The remaining six cases either assume that the Due Process Clause requires the appointment of expert assistance for indigent defendants or rely upon independent state law as satisfying the requirements of the Due Process Clause as interpreted in **Ake v. Oklahoma**, 470 U.S. 1087 (1985) and **Caldwell v. Mississippi**, 472 U.S. 320 (1985).

Two of the cases cited by Petitioner note that their statutes, as construed by the courts, provide for the appointment of expert witnesses to indigent defendants by the trial courts. **State v. Berry**, 707 P.2d 638 (Ore. 1985); **State v. Artis**, 342 S.E.2d 847 (N.C. 1986). In **State v. Berry**, the Court held that appointment of an expert was unnecessary because the subject matter of the expert testimony (Native American religion) had been properly held to be irrelevant. In **State v. Artis**, the Court held that the defendant had failed to make a particularized showing of need for the aid of a social psychologist to assist in jury selection.[1]

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[1] The defendant had erroneously argued that placing the burden of making a showing of need upon him violated **Ake v. Oklahoma**, supra, and **Caldwell v. Mississippi**, 472 U.S. 320 (1985). The North Carolina Supreme Court's rejection of this argument is consistent with the Eighth Circuit's approach of placing the burden upon the defendant to demonstrate a "reasonable probability that an expert would aid in his defense,

The remaining four states perceived by Petitioner as conflicting with the Eighth Circuit likewise found that the defendant in each had failed to show a need for the appointment of the expert or that the trial court's failure to appoint an expert, in the context of the trial, did not deprive the defendant of a fair trial. By example, these cases amply demonstrate that the trial and appellate courts are able to apply the precepts of **Ake** and **Caldwell** without further guidance from this Court. More importantly, none suggest that the holding in **Ake** is restricted to capital cases where the defendant's mental condition is an issue.

In **Plunkett v. State**, 719 P.2d 834 (Okla.Cr.App.), cert. denied, 107 S.Ct. 675 (1986), the Court held that the defendant was not denied the "basic tools" of a defense where the state's "expert" was a laboratory technician relating the results of tests, and the defendant called both a professor of microbiology and a professor of statistics to explain the results.[2] In **Schultz v. State**, 497 N.E.2d 53 (Ind. 1986), the court found no denial of a fair trial where the defendant had failed to request the appointment of experts until after the trial; the defendant did not seriously question the expert testimony; and witnesses independent of the scientific evidence tied the defendant to the crime. In **State v. Evans**, 710 S.W.2d 530 (Tenn.Cr.App. 1985), the Court upheld the trial court's refusal to appoint a ballistics expert, where there was no serious challenge to the competence of the state's expert or his results, the defendant took the stand and testified that he fired the gun in question, and independent witnesses confirmed the defendant's participation

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and that denial of expert assistance would result in an unfair trial." (App. A-7).

[2] **See**, **Stafford v. Love**, 726 P.2d 894 (Okla. 1986); and **Woodard v. State**, 743 P.2d 662 (Okla. Cr. App. 1987), Parks, J., dissenting at pp. 664-666.

in the crime. In Grayson v. State, 479 So.2d 69 (Ala.Cr.App. 1984), aff'd. sub nom. Ex Parte Grayson, 479 So.2d 76 (Ala. 1985), cert. denied, 106 S.Ct. 189 (1985), the Court held that the appointment of experts was unnecessary where the physical evidence was non-specific, its limitations fully explained to the jury, and the most damaging evidence consisted of the defendant's own statements.[3]

The Petitioner, in a footnote (Petition, p. 12, n.2), suggests that the Eleventh Circuit has taken a position contrary to that of the Eighth Circuit. However, the Eighth Circuit cited the same Eleventh Circuit case, Moore v. Kemp, 809 F.2d 702 (11th Cir.)(en banc), cert. denied, 107 S.Ct. 2192 (1987), as authority for its holding. (App. A7). Interestingly, the Petitioner, in quoting Moore v. Kemp, omits from the quotation the very next sentence which demonstrates that the two cases are in complete harmony:

> ...We question the wisdom of such due process requirements absent a substantial showing, such as the one made in Ake, of a significant benefit to the truth-seeking function of the trial.

809 F.2d at p. 712, footnote 8. (Emphasis supplied.)

The fact is that virtually every jurisdiction which has considered the question has found that fundamental fairness would require the appointment of expert witnesses for indigent defendants in certain circumstances. None have suggested the limitations proposed by Petitioner.

Rather the focus has been on the standard of need, and in that respect there is remarkable consensus in the requirement that the defendant demonstrate a "reasonable probability that an expert would aid in his defense and that denial of expert assistance would result in an unfair trial." (App. A-7). United States v.

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[3] In so holding the Alabama Court of Criminal Appeals stated, "We recognize that due process and fair play may demand the accused be furnished with the assistance of experts in preparing his defense." 479 So.2d at p. 72.

Brewer, 783 F.2d 841, 842 (9th Cir.), cert. denied, 102 S.Ct. 118 (1986); Johnson v. Harris, 682 F.2d 49, 51 (2nd Cir.), cert. denied, 459 U.S. 1041 (1982); Matlock v. Rose, 731 F.2d 1236, 1244 (4th Cir.), cert. denied, 470 U.S. 1050 (1985); State v. Tison, 633 P.2d 335, 342 (Ariz. 1981), cert. denied, 459 U.S. 882 (1982), reh. denied, 459 U.S. 1024 (1982); Pickens v. State, 652 S.W.2d 626, 626 (Ark. 1983); Corenevsky v. Superior Court, 682 P.2d 360, 367 (Cal. 1984); People v. Martinez, 734 P.2d 126, 130 (Colo. App. 1986); Van Arsdale v. State, 486 A.2d 1, 14 (Del. 1984), vacated on other grounds, ___ U.S. ___, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); State v. Hoopii, 710 P.2d 1193, 1195 (Hawaii 1985); State v. Olin, 648 P.2d 203, 206 (Idaho 1982); People v. Kinion, 454 N.E.2d 625, 631 (Ill. 1983); Palmer v. State, 486 N.E.2d 477, 481 (Ind. 1985); English v. Missidline, 311 N.W.2d 292 (Iowa 1981); Hicks v. Commonwealth, 670 S.W.2d 837, 838 (Ky 1984), cert. denied, 469 U.S. 1040 (1984); State v. Anaya, 456 A.2d 1255, 1262 (Me. 1983); Johnson v. State, 476 So.2d 1195, 1202-1203 (Miss. 1985); State v. Campbell, 498 A.2d 330, 332 (N.H. 1985); State v. Gardner, 319 S.E.2d 591, 598 (N.C. 1984), cert. denied, 469 U.S. 1230 (1985); State v. Hallman, 391 N.W.2d 191, 195 (S.D. 1986); State v. Melos, 713 P.2d 138 (Wash. App. 1986).

The Eighth Circuit's unanimous decision in this case is in accord with the substantial weight of decisions from other jurisdictions. For that reason, Petitioner has failed to demonstrate that there exists any conflict between the jurisdictions, deep or otherwise.

B. The Eighth Circuit has enunciated a standard which can be, and is now, easily applied by trial and appellate courts.

Petitioner's near-hysterical fears of "the spectre of motion after motion, hearing after hearing, expert after expert, fee

bill after fee bill" (Petition, p.12) are stated without reference anywhere in the argument to the actual standard enunciated by the Court of Appeals. Ironically, while criticizing the Eighth Circuit's rule in the first argument (Petition, p. 12), in his second argument Petitioner concedes that the Court of Appeals properly applied the standard required by Ake.

The danger of nonmeritorious litigation is greatest where no standard has been announced. When neither the parties nor the courts can ascertain the limits of the right conferred, the parameters are developed by litigating every case. Here, the Eighth Circuit has defined the standard clearly and, as demonstrated, above, the trial and appellate courts of the many jurisdictions are already applying the same standard with little apparent difficulty.[4]

Taken literally, Petitioner's argument suggests that a constitutional right should be denied because defendants will assert the right. The infirmity of such an argument is apparent and hardly constitutes a grounds for the grant of the Writ of Certiorari.

II.

The Eighth Circuit's holding that Respondent met his burden of demonstrating a reasonable probability that an expert in hypnosis would aid in his defense is fairly supported by the record at the time of trial.

Petitioner agrees that the Court of Appeals applied the standard required by Ake v. Oklahoma when it unanimously found that an expert in hypnosis would have substantially aided in the Respondent's defense and that the denial of the expert assistance

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[4] The Eighth Circuit defined the standard as follows:

> Ake and Caldwell taken together hold that a defendant must show more than a mere possibility of assistance from an expert. Rather, the defendant must show a reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial.

(App. A7).

had a material impact on his trial. (Petition, p. 16). Petitioner seeks this Court's grant of certiorari based upon his disagreement with this finding.

Petitioner states that Respondent's request for the appointment of an expert in hypnosis "would help only to determine the 'suggestibility' of the victim during hypnosis". (Petition, p. 17, n.4). Petitioner argues that since there was no factual record of the hypnosis[5], there was no factual record any suggestibility. Since there was no factual record of suggestibility, Respondent's request for an expert to determine suggestibility is, according to Petitioner, an "undeveloped assertion." However, Petitioner has not fairly stated Respondent's request for assistance as reflected in the record which was before the Court of Appeals.

At the time of the hearing of Respondent's Motion for the Appointment of Expert, the trial court had before it the unrefuted content of the motion itself (App. A104-A107), the statement of counsel (A102) and, shortly thereafter, the "expert" testimony of the police hypnotist who, after being qualified as an expert, was permitted to testify generally regarding his theory of memory and hypnosis, and the propriety of his hypnosis of the victim.[6] In the Motion, counsel informed the trial court that:

> Prior to undergoing hypnosis, the prosecutrix M.B.G. said she did not see the assailant's face. Sometime after undergoing hypnosis administered by the state's "expert", M.B.G. was able to say she saw a portion of her assailant's face during the alleged rape and thereafter, was able to identify him by recognizing his face in a lineup and in a photo throwdown.

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[5] The partial tape recordings of one hypnotic session were deliberately destroyed by the police, giving rise to Respondent's claim of a violation of California v. Trombetta, 467 U.S. 479 (1984). No record of the second hypnosis was made.

[6] The Missouri Court of Appeals, which reversed Respondent's conviction, summarized in detail the hypnotist's testimony. (App. A55-58).

> At the trial and at a motion hearing to suppress statements, such expert would be essential to the defendant in the preparation and cross-examination of the state's expert and the prosecutrix M.B.G. Therein, the requested expert would help defendant effectively cross-examine the state's expert and M.B.G. as to the suggestibility of the hypnotic session and inform the trier of fact as to the problems inherent with hypnosis.

(App. A106). The defendant requested a "...trained psychiatrist or psychologist who is an expert in the administration of hypnosis, the techniques of an hypnotic interview and knowledgeable in the psychology of hypnosis and its effects on memory." (App. A106). At the time of the hearing defense counsel also stated to the Court:

> MR. ROBBINS: Judge, several of the motions, at least one of the motions which will be heard shortly, involve an hypnotic test performed by the Cape Girardeau Police Department. We are in a position to offer to this court law regarding hypnotic interviews. The suggestibility which relates to the total problem today, which will be identification testimony at the trial in April, we need such an expert--that expert being a psychiatrist or psychologist, whoever it is, who is versed in hypnosis, hypnotic interview, and the suggestibility which is inherent in that process...

(App. A102).

Thus, the trial court was on notice as to precisely the kind of expert Respondent requested, "the nature of prosecution's case and how the requested expert would be useful." Moore v. Kemp, 809 F.2d 702, 718 (11th Cir. 1987), cert. denied, 107 S.Ct. 2192 (1987). See, State v. Campbell, 498 A.2d 330, 332 (N.H. 1985).

In rejecting Petitioner's argument, below, the Court of Appeals stated:

> We are mindful of the finding of the Supreme Court of Missouri that there was simply no evidence of improper suggestiveness during any of the hypnotic sessions conducted in this case. It would follow that an expert would have contributed nothing useful. His testimony would simply have been irrelevant. Our impulse was to defer to this finding, but on reflection we conclude that we cannot. M.B.G. did not identify Little until after being hypnotized. She had

> glimpsed only the right profile of the criminal, and had done so only for a time period so short as to be described by the Missouri Supreme Court as "at least two seconds...." 674 S.W.2d at 542. The police hypnotist told her that hypnosis would improve her memory, and in fact her memory did later improve, or at least she thought it did. We think an expert witness could well have explained to the judge and jury how M.B.G. could have been influenced by improper suggestion, even without Lincecum's intending it or her realizing it. The conclusion that there was no improper suggestion or other taint could well itself have been different if Little had been given expert assistance.

(App. A10). (Emphasis supplied.)[7]

This carefully considered conclusion by the judges of the Eighth Circuit is fairly supported by the record in the state courts. Other than dissatisfaction with the result, Petitioner has offered no substantial reason for this Court to exercise its discretionary power of certiorari. As Petitioner has expressed no disagreement with the standard employed by the Eighth Circuit, Respondent respectfully suggests that Petitioner has stated no cause for the issuance of the writ.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that the Writ of Certiorari be denied.

Respectfully submitted:

TOBY H. HOLLANDER
Counsel for Respondent

Toby H. Hollander
145 Lisbon Street, 7th Floor
Lewiston, Maine 04240
(207) 784-1558

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[7] The use of expert testimony to explain the dangers inherent in hypnotically induced testimony was recognized by this Court in **Rock v. Arkansas**, ___ U.S. ___, 107 S.Ct. 2704, 97 L.Ed.2d 37, 52 (1987).